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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 495

COMMUNIST PARTY, U.S.A., ET AL., PETITIONERS,

vs.

**MARTIN P. CATHERWOOD, AS INDUSTRIAL
COMMISSIONER.**

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK**

PETITION FOR CERTIORARI FILED OCTOBER 20, 1960

CERTIORARI GRANTED DECEMBER 12, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

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**IN COURT OF APPEALS
STATE OF NEW YORK**

**In the Matter
of**

**The Claim for Benefits under Article 18 of the Labor Law
made by WILLIAM ALBERTSON, Claimant-Respondent,
MARTIN P. CATHERWOOD, as Industrial Commissioner,
Appellant.**

**In the Matter
of**

**The Liability for Unemployment Insurance Contributions
under Article 18 of the Labor Law of COMMUNIST PARTY,
U. S. A. and COMMUNIST PARTY OF NEW YORK STATE,
Employers-Respondents,
MARTIN P. CATHERWOOD, as Industrial Commissioner,
Appellant.**

Consolidated Record on Appeal

[fol. 11]

**BEFORE THE UNEMPLOYMENT INSURANCE APPEAL BOARD
OF THE STATE OF NEW YORK**

**EXCERPTS FROM RESETTLED CONSOLIDATED DECISION OF
UNEMPLOYMENT INSURANCE APPEAL BOARD**

[fol. 12] Hearings were held before the referee and before the Board at which all parties appeared and were accorded a full opportunity to be heard. Briefs and written statements submitted on behalf of the claimant and on behalf of the employers and a brief submitted on behalf of the Industrial Commissioner were considered by the Board.

After a review of the record including testimony and evidence adduced before the referee and before the Board, and due deliberation having been had thereon, and having found that the referee's findings of fact and conclusions of law are fully supported by the record in this case, and that no errors of fact or law appear to have been made, the Board adopts the findings of fact and conclusions of law made by the referee as the findings of fact and conclusions [fol. 13] of law of the Board, except that upon all of the facts now before the Board and as a matter of law, we find that the referee erred in giving claimant credit for his earnings with C. R. C. under the Unemployment Insurance Law and we find further that as a result thereof claimant is ineligible for benefits.

OPINION: The Board is of the opinion that the referee made proper findings of fact and correctly determined the issues involved in these cases, except as modified and supplemented above.

DECISION: The decision of the referee is modified and, as so modified, is affirmed. The claimant is ineligible for benefits under the Unemployment Insurance Law. The initial determination as to the claimant and the determinations as to the employers herein made by the Industrial Commissioner are sustained.

Separate orders are to be entered in each case.

Dated January 24, 1958*

WX-SR

-C2

John E. McGarry, Member.

*Subject of change

Dated February 7, 1958

Mortimer H. Michaels, Member
For: Appeal Board

[fol. 19]

BEFORE THE UNEMPLOYMENT INSURANCE REFEREE SECTION.
EXCERPTS FROM CONSOLIDATED DECISION OF UNEMPLOYMENT
INSURANCE REFEREE

FINDINGS OF FACT: Hearings were held at which claimant, his attorney, a witness for and the attorney for the employers Communist Party of U. S. A., and Communist Party of the State of New York, and a representative of the Industrial Commissioner appeared, and testimony was taken. Memoranda were submitted by the claimant and employers.

[fol. 20] . . . Following the issuance of the aforementioned initial determination by the local office ruling claimant ineligible for benefits, determinations were issued by the Industrial Commissioner on March 26, 1957, ruling that the registration numbers of the Communist Party, U. S. A., and Communist Party of New York State, as employers, were suspended commencing January 1, 1957, and that thenceforth no contributions should be made by either of them. Hereinafter in this decision, the term "Parties" will be used to refer to both "Communist Party, U. S. A.," and "Communist Party of New York State." The term "National Party" will be used to refer to "Communist Party, U. S. A." alone and the term "State Party" will be used to refer to "Communist Party of New York State" alone.

[fol. 22] The Commissioner's representatives offered no evidence whatever with respect to the activities of the Parties or Civil Rights Congress, but, in effect, urged that, as a matter of law, it must be held that all of such entities were engaged in unlawful activities. . . .

[fol. 25] . . . The Attorney General, in his advisory opinion, made no reference whatever to the political beliefs of claimant but he arrived at his conclusions on the basis of an analysis of the various statutes and Court precedents dealing with the *employment*, which is the subject of this

proceeding. The argument of the Parties that the ruling of the Commissioner and the opinion of the Attorney General were dictated by reasons of political expediency, appears to be entirely baseless.

In an attempt to perform his duties in accordance with the obligations imposed upon him in his office as the Administrator of the Unemployment Insurance Law, the Industrial Commissioner sought the advice of the legal officer of the State as to the course to be followed by him in view of the various congressional and legislative enactments which created doubt with respect to the validity of the claim asserted by claimant herein. The Attorney General, in pursuance of the request received by him, rendered his opinion, setting forth at length the basis for his conclusions. The Referee has given careful consideration to the matters contained in such opinion, as well as to all of the matters contained in the memoranda submitted by the attorneys for claimant and for the Parties. He has arrived at his conclusion solely on the basis of his interpretation of the applicable law, and without regard to any personal opinions concerning the wisdom of such laws or the practical effect thereof. He has no jurisdiction except to determine whether the disposition made, initially, by the Commissioner's representatives accords with the facts and the law.

.

[fol. 27] THE COMMUNIST PARTY EMPLOYMENT

To support the contention that claimant was not in "employment" for the National Party, the Commissioner's representatives cite numerous declarations of the legislature of this State, of Congress and of the Courts, to the effect [fol. 28] that the "Communist Party of the United States, although purportedly a political body, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States." (50 U. S. C. 841; 50 U. S. C. 781; *Feinberg Law*, L. 1941, Ch. 360, Sec. 1; *Security Risk Law*, L. 1951, Ch. 233, Sec. 1; *McKinney's Unconsolidated Laws*, Sec. 1101; *Matter of Daniman v. Board of Education of the City of New York*, 306 N. Y. 532, 540; *Dennis v. United*

States, 341 U. S. 499; *American Communications Ass'n v. Douds*, 339 U. S. 382; and, *Adler v. Board of Education*, 342 U. S. 485.) These declarations are, of course, entitled to careful consideration but cannot be accepted as the conclusion of this Referee since such declarations are not pronouncements of law and this Referee is bound to limit his findings to the matters adduced by the proof in this record. However, the Commissioner's representatives do not rely solely on these declarations but they urge that Congress has effectively outlawed the Communist Party and thus, by force of law, the Referee is bound to find that, during claimant's base period, there could not have been any valid employment by the National Party.

The Act of Congress relied upon is the Communist Control Act (Public Law 637, 83rd Congress (2d session).) Section 842 of that Act (50 U. S. C.) provides as follows:

"Sec. 842. Proscription of Communist Party, its successors, and subsidiary organizations.

"The Communist Party of the United States, or any successors of such party regardless of the assumed [fol. 29] name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated"

The quoted section of the Act clearly sets forth the mandate of Congress that *"whatever rights, privileges, and immunities . . . have heretofore been granted to said (Communist) party or any subsidiary organization by reason of the*

laws of the United States or any political subdivision thereof, *are terminated.*"

Does this Act, which became effective August 24, 1954, affect the status of claimant herein during the base period which was subsequent to the effective date of the Act? Careful analysis of the question compels an affirmative answer.

The Parties argue that the Act is entirely inapplicable because it makes no provision for the termination of any rights, except those of the Party itself. Consequently, it is [fol. 30] contended the Act cannot be used as the basis for denying to claimant the right to receive benefits, and in that connection, the Parties, allegedly assert no "right," nor do they claim any "privilege" or "immunity," but rather submit to their "obligation" as a taxpayer. The fallacy in such argument is that before the "*obligation*" can arise, a "*right*" must have been exercised; namely, the right to enter into a contract of employment. That "*right*" is precisely what was terminated by the mandate of Congress as expressed in 50 U. S. C. 842 (64 *Yale Law Review* 712, note 45.) If there were any doubt with respect to whether the right to enter into a contract of employment were encompassed in the proscribed rights, it would be proper to look to the evil which Congress sought to prevent and to ascertain whether there is a direct relationship between the denial of the right to enter into a contract of employment and that evil. No speculation is required to determine the evil which Congress sought to prevent. Section 841 of the Communist Control Act provides the answer. We are informed by the language of that section that Congress enacted the provisions of Section 842 in order that "the Communist Party should be outlawed." Is there, then, a direct relationship between the deprivation of the right to enter into a contract of employment and the intent to outlaw the Communist Party? The answer is obvious. An artificial entity can function only through the media of employees and agents. The termination of the Parties' right to legally employ persons is a means of correcting the evil sought to be corrected by the Congressional mandate and, thus, the direct relationship is established.

[fol. 31] Having thus determined that Congress effectively terminated the right of the Parties to enter into contracts of employment, we are not required to consider whether, having actually entered into a contract whereby claimant was employed, despite the proscription, he is, nevertheless, entitled to be credited with such employment as a basis for qualifying for unemployment insurance benefits.

Claimant can be credited only with weeks of employment which are defined as weeks in which he did some work "*in employment*" (Section 524, Unemployment Insurance Law.) The term "employment" has a restricted meaning and is limited to the definition contained in the Law (Section 511.1) as follows:

"'Employment' means any service *under any contract of employment* for hire, express or implied, written or oral." (Italics supplied.)

From the foregoing, it is apparent that the *sine qua non* of a valid claim for credit of weeks of unemployment is the existence of a contract of employment. It is established law that there can be no valid contract unless the parties to the agreement have the requisite capacity to contract. If one of the parties to the alleged contract lacks capacity, there is no contract. It is void at its inception.

"If a statute prohibits a particular class of contracts this, of course, restricts the right of persons to contract in contravention of the statute, and contracts which are directly violative of or have for their objective the violation of statutes enacted for the protection of the [fol. 32] public are generally held illegal. This is especially true where the violation of the statute is made a criminal offense; it is ordinarily true whether the act prohibited by the statute is *malum prohibitum* or *malum in se*, and it is immaterial that the statute violated is one of local application only . . . It is not necessary that the statute expressly declare that the prohibited contract shall be void, and where a statute imposes a penalty for the doing of an act, though it is not expressly prohibited, the act is made unlawful and

a contract in contravention of the statute is held illegal. Our state courts also refuse to enforce contracts in contravention of Federal statutes." (*New York Law of Contracts, Clark, Section 397.*)

(Also see *Axelrath v. Spencer Kellog & Sons, Inc.*, 33 N. Y. S. 2d 94, aff'd 265 App. Div. 874, aff'd 290 N. Y. 767, cert. denied 320 U. S. 761; and, *Strum v. Truby*, 245 App. Div. 357.)

The foregoing principle necessarily precludes the recovery of benefits under any statute which requires the existence of a contract of employment as a basis for a claim. Thus, in the *Matter of Clarke v. Town of Russia*, 283 N. Y. 272, it was held that services performed as a highway laborer by one who occupied the status of a Justice of the Peace was not covered by the provisions of the Workmen's Compensation Law because a statute specifically prohibited such employment. The Court there said,

"To establish her right to benefits under the Workmen's Compensation Law, it was essential for claimant to show that the technical relationship of employer and [fol. 33] employee existed between her husband and the town. Under the Common Law, a contract between a municipality and one of its officers is against public policy and illegal. (*Beebe v. Supervisors of Sullivan County*, 64 Hun. 377, aff'd. 142 N. Y. 631.) The decedent's contract of employment was not merely voidable, but void. A compensation award based upon an illegal contract which is void cannot be sustained. (*Matter of Swihura v. Horowitz*, 242 N. Y. 523; *Herbold v. Neff*, 200 App. Div. 244.) Since the relationship of employer and employee never existed between the town and the deceased, the reasoning found in *Matter of Kenny v. Union Railway Company*, (166 App. Div. 497) and in *Matter of Ide v. Faul and Timmins*, (179 App. Div. 567) is inapplicable."

The principle thus enunciated is applicable in the instant case and, in accord therein, it necessarily follows that any services which claimant may have rendered for the Na-

tional Party were not performed under a contract of hire recognized as such in law. Such services, therefore, are not within the coverage of the provisions of the Law. The parties hereto have adverted to the effect of claimant's knowledge or lack of knowledge of the activities of the National Party, and the advisory opinion of the Attorney General indicated that such knowledge by claimant could be fairly be inferred. The Parties, on the other hand, contend that no such inference may be made to deny benefits to claimant, and that the ruling should fail because there was no proof of claimant's actual knowledge established [fol. 34] herein. In my view of the matter, it is entirely immaterial whether claimant had knowledge of the activities of the National Party for whom he rendered service. He is unable to obtain credit for the services he rendered to the National Party solely because Congress prevented him from entering into a legal contract of employment with that entity.

The recent decision of a Social Security Referee (*Matter of Foster et al.* decided June 21, 1956) holding that applicants for Federal old age benefits could not be denied credit of their earnings while employed by the Communist Party has been read with interest by me, but is neither controlling nor analogous to the issues here presented. The sole issue before that Referee was whether employment by the Communist Party constituted employment by a foreign government. He answered that question in the negative. It does not appear that his decision was based on any earnings credited to any of the claimants as a result of employment by the Communist Party subsequent to the enactment of the Communist Control Act. Benefits under the Social Security Act stem from the employment in each of the years beginning with 1935. The applications reviewed by the Social Security Referee were based on employment which had occurred no later than May, 1955. Obviously, the Communist Control Act cannot affect any employment which preceded the effective date of the Act. Moreover, the definition of "employment" in the Social Security Act is substantially different from that contained in the Unemployment Insurance Law (Federal Insurance Contributions Act,

[fol. 35] Sec. 3121 (b).) The decision of the Social Security Referee and the conclusions at which I have arrived are not necessarily incompatible.

For all of the above reasons, I conclude that claimant may not be credited with his employment by the Communist Party.

[fol. 38]

COMMUNIST PARTY AS A LIABLE EMPLOYER

The protest of the Parties to the Rulings suspending their registration numbers presents a situation which is somewhat anomalous in that it constitutes a plea for permission to pay taxes rather than to be relieved of a tax liability. The two reasons which motivate that protest are obvious. The Parties erroneously assume that the payment of contributions by them *ipso facto* provides coverage to their employees, and they further expect that acceptance of contributions from them will result in an ultimate tax saving by providing them with a substantial credit against their liability under the Federal Employment Tax Act.

Whether or not contributions were accepted from the Parties would not necessarily determine the benefit rights of persons employed by them. In *Matter of Casseretakis*, 289 N. Y. 119, 126 (affirmed 319 U. S. 306) reversing Appeal Board, 4014-40, the Court pointed out that the employer's duty to pay contributions and the employee's right to receive benefits are independent of each other. Consequently, the fact that the Commissioner accepted contributions from the National Party during claimant's base period does not alter my conclusion with respect to his non-entitlement to receive credit of that employment.

The correctness of the Commissioner's ruling suspending the registration numbers of the Parties must be tested by the statutory provisions without regard to the possible effect of such ruling or the Parties' liability under various Federal Tax Statutes. That such ruling may result in heavier taxation for the Parties is of no moment (see *Matter of Mallia*, 299 N. Y. 232, affirming 273 App. Div. 391, revers-

[fol. 39] ing Appeal Board, 13-124-44, wherein the Court held that the fact that an employer had paid contributions to another State did not relieve it of its liability under the New York Law, albeit it was the identical employment which was the basis for the liability to both States.)

The basis for the suspension of the registration numbers of the Parties is that they are not "employers" within the contemplation of the provisions of the Unemployment Insurance Law. The statute does not specifically define "Employer" but merely enumerates the various types of legal bodies which are included within the term (Sec. 512, Unemployment Insurance Law.) Nevertheless, the language of the entire Law conclusively indicates that the term refers only to employers of persons *in employment* as specifically defined in Section 511.1 of the Law. We have earlier indicated that by reason of the proscription of the Communist Control Act, the National Party lacks the capacity to enter into contracts of employment and, hence, it follows that it cannot qualify as an employer within the purview of the Law. Although it is only the National Party which is directly named in the Communist Control Act, the same proscription applies to the State Party since that entity obviously is a "subsidiary organization" which was similarly divested of the right to enter into a contract of employment (64 Yale Law Review 712, 717, note 35.)

It is contended that the rulings are without legal sanction because the Commissioner accepted contributions from the Parties at least up to December 31, 1956, and never previously contended that they were not subject to the provisions [fol. 40] of the Unemployment Insurance Law. It is urged that this action binds the Commissioner to rule that claimant worked in covered employment when he performed services for the National Party prior to December 1, 1956, and that under the rule of "practical construction" the Commissioner is required to continue to accept the Parties as subject employers. I cannot accept the contention so advanced. The rule of practical construction can have application only when it has continued for a long or considerable period of time, and only in the event that there is ambiguity in the

statute. (*McKinney's Consolidated Laws*, Volume 1, Statutes, Section 128.)

In the instant case, the Commissioner's ruling is based upon an Act which became effective only about two years before the instant ruling was made. It can hardly be said that in view of the administrative machinery involved in the collection of contributions and the payment of benefits, a delay of approximately two years in making the ultimate ruling constituted indulgence in a contrary interpretation for a long period of time. Moreover, I find no ambiguity in the applicable statutes which would give rise to an application of the rule of practical construction. Finally, the fact that the Commissioner may have erroneously accepted contributions between the effective date of the Communist Control Act and December 31, 1956, does not bar him from correcting the error at this time. In *Lanolin Plus Cosmetics, Inc. v. Marzall*, 196 F. 2nd, 591, (C. C. A., D. C.), cert. denied 344 U. S. 823, it was said,

"... but the fact that the office has erred in those instances does not mean it should err in this one."

[fol. 41] The Parties seek to take refuge in the 1953 amendment to Section 518 and the 1954 amendment to Section 560 of the Unemployment Insurance Law. The 1954 amendment provided that,

"Any employer shall become liable for contributions under this article if:

• • • • •
 "(c) he is liable for tax under the provisions of the Federal Unemployment Tax Act."

The 1953 amendment included in the term "wages" all compensation paid by an employer liable under the Federal Unemployment Tax Act even though the services are not in employment as defined by Section 511. It is contended that, irrespective of any other considerations, the mandate of the Unemployment Insurance Law requires a reversal of the rulings of the Commissioner because the Parties have paid contributions under the Federal Unemployment Tax Act.

at least up to the date of the hearing. I am not persuaded by that argument. The section applies only to an "employer". I have earlier indicated that the Parties have been unable to qualify as employers under the provisions of the Law since the enactment of the Communist Control Act. The amendments to Sections 518 and 560, therefore, can have no application to them. Whether or not they are properly liable for taxes under the provisions of the Federal Unemployment Tax Act is a matter to be determined by the appropriate Federal agency. That such agency may or may not agree with the ruling of the State agency is of no consequence. It has been pointed out that,

[fol. 42] "Rules and regulations of federal administrative agencies are not controlling. Although consistency of interpretation of similar statutes is desirable, such interpretations are not binding. (See Section 560.5 of the Law, and *Matter of Dunne*, 293 N. Y. 780, affirming Appeal Board 4140-40.)" *Appeal Board*, 41,113-53.

My attention has been called to the fact that by Chapter 836 of the Laws of 1956, Congress has amended the provisions of the Social Security Act and the Federal Insurance Contributions Act by, in effect, excluding from the coverage of the Social Security Act, employment by an organization required to register under the Subversive Activities Control Act, but that Congress did not similarly amend the provisions of the Federal Unemployment Tax Act. I attach no significance to this omission. Congress may have been satisfied that the Law required no amendment because, by virtue of the provisions of the Communist Control Act, the liability of the Communist Party under the Federal Unemployment Tax Act automatically terminated, or Congress may have deemed it expedient to require the payment of such taxes irrespective of the effect which such obligation might have on the status of the Communist Party under State laws.

[fol. 43] . . . We need not determine whether the activities of the Parties fall within the defined prohibited activities of the Internal Security Act. The Communist Control Act,

which binds us in this proceeding, specifically names the National Party and, by reference, the State Party. That Act, in and of itself, dictates the result at which I have arrived, and it is to that Act alone to which we must look to support this decision.

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[fol. 48]

BEFORE THE UNEMPLOYMENT INSURANCE ACCOUNTS BUREAU

DETERMINATION OF THE COMMISSIONER WITH RESPECT TO
COMMUNIST PARTY, U. S. A.—March 26, 1957

[Letterhead of]

DIVISION OF EMPLOYMENT

March 26, 1957

Communist Party, U. S. A.

101 West 16th Street

New York 11, New York

E. R. #: 86-70614

Gentlemen:

The records on file at this office show that for a number of years past you have registered with this Division as an employer liable for contributions and have, in fact, filed reports for all calendar quarters to and including the fourth quarter of 1956.

In August of 1954, the Congress of the United States found and declared the Communist Party to be engaged in activities inimical to the well being of the United States and to be, in fact, an instrumentality of a conspiracy to overthrow the government of the United States. By Section 841 et seq. of Title 50, U. S. C. A., the Communist Party of the United States and all of its subsidiary organizations were outlawed.

Following the filing of a claim for benefits by a person formerly in the employ of the Communist Party of New York State, an opinion was sought of the Attorney General of the State of New York whether employment with the

[fol. 49] Communist Party of New York State or the Communist Party of the United States may serve as a basis for determining eligibility for unemployment insurance benefits under the New York Unemployment Insurance Law, and whether compensation in such employment is subject to the payment of unemployment contributions. In an opinion issued by the Attorney General, dated January 29, 1957, it was concluded that unemployment insurance contributions should not be received, under the New York State Unemployment Insurance Law, from the Communist Party of New York State or the Communist Party of the United States, and that employment with the Communist Party of New York State or the Communist Party of the United States should not be credited as a basis for determining unemployment insurance benefits.

A claim is currently pending before an Unemployment Insurance Referee to determine the right to benefits by a claimant formerly employed by the Communist Party. Pending final adjudication of the matter, we have suspended the registration of the Communist Party of the United States. In the meantime, no reports and no payment of contributions need be made by you for the first quarter of the year 1957 or thereafter.

Very truly yours,

/s/ ALFRED L. GREEN
Alfred L. Green, Director
Unemployment Insurance Accounts
Bureau

[fol. 50]

REQUEST OF COMMUNIST PARTY, U. S. A. FOR A HEARING—
April 2, 1957

COMMUNIST PARTY, U. S. A.

April 2, 1957

Dr. Isador Lubin
Industrial Commissioner
Department of Labor
Albany, New York

Re: E. R. #: 86-70614

Dear Sir:

We have received a letter dated March 26, 1957 bearing the above symbols from Alfred L. Green, Director, Unemployment Insurance Accounts Bureau, stating that pending final adjudication of a claim currently pending before an Unemployment Insurance Referee to determine the right to benefits by a claimant formerly in our employ, the registration of the Communist Party of the United States, as an employer liable to contributions to the Unemployment Insurance Fund has been suspended.

Pursuant to section 620, subdivision 2, of the Labor Law and Rule 2 of the Rules of the Unemployment Insurance Appeal Board, the undersigned applies for a hearing before a referee on the determination set forth in Mr. Green's letter.

The reason for this application is that the determination in question is unauthorized by and contrary to the Unemployment Insurance Law.

Very truly yours,

COMMUNIST PARTY OF THE U. S. A.

by HENRY AARON
Administrative Secy.

[fol. 51]

BEFORE THE UNEMPLOYMENT INSURANCE ACCOUNTS BUREAU

DETERMINATION OF THE COMMISSIONER WITH RESPECT TO
COMMUNIST PARTY OF NEW YORK STATE—March 26, 1957

[Letterhead of]

DIVISION OF EMPLOYMENT

March 26, 1957

Communist Party of New York State
101 West 16th Street
New York 11, New York

E. R. #: 86-71878

Gentlemen:

The records on file at this office show that for a number of years past you have registered with this Division as an employer liable for contributions and have, in fact, filed reports for all calendar quarters to and including the fourth quarter of 1956.

In August of 1954, the Congress of the United States found and declared the Communist Party to be engaged in activities inimical to the well being of the United States and to be, in fact, an instrumentality of a conspiracy to overthrow the government of the United States. By Section 841 et seq. of Title 50, U. S. C. A., the Communist Party of the United States and all of its subsidiary organizations were outlawed.

Following the filing of a claim for benefits by a person formerly in the employ of the Communist Party of New York State, an opinion was sought of the Attorney General [fol. 52] of the State of New York whether employment with the Communist Party of New York State or the Communist Party of the United States may serve as a basis for determining eligibility for unemployment insurance benefits under the New York Unemployment Insurance Law, and whether compensation in such employment is subject

to the payment of unemployment contributions. In an opinion issued by the Attorney General, dated January 29, 1957, it was concluded that unemployment insurance contributions should not be received, under the New York State Unemployment Insurance Law, from the Communist Party of New York State or the Communist Party of the United States, and that employment with the Communist Party of New York State or the Communist Party of the United States should not be credited as a basis for determining unemployment insurance benefits.

A claim is currently pending before an Unemployment Insurance Referee to determine the right to benefits by a claimant formerly employed by the Communist Party. Pending final adjudication of the matter, we have suspended the registration of the Communist Party of New York State. In the meantime, no reports and no payment of contributions need be made by you for the first quarter of the year 1957 or thereafter.

Very truly yours,

/s/ ALFRED L. GREEN
Alfred L. Green, Director
Unemployment Insurance Accounts
Bureau

[fol. 54]

BEFORE THE UNEMPLOYMENT INSURANCE REFEREE

EXCERPTS FROM MINUTES OF HEARING BEFORE REFEREE,
DATED MARCH 25, 1957STATE OF NEW YORK—
DEPARTMENT OF LABOR

UNEMPLOYMENT INSURANCE REFEREE SECTION

Social Security No.: 113-12-4679

Case No.: 510-128-57R

Appeal Board No.: 60,971-57

 [SAME TITLE]

Date of Hearing: March 25, 1957

Place of Hearing: 500 Eighth Avenue,
New York, New YorkBefore: PHILIP F. WEXNER,
RefereeReported By: ARTHUR HOLLAND,
Hearing Reporter

APPEARANCES:

INDUSTRIAL COMMISSIONER,

by: HARRY ZANKEL, Counsel,
Division of Employment,
(BENJAMIN WILKOFFSKY,
Hearing Representative.)

WILLIAM ALBERTSON, Claimant.

STEPHEN VLADECK, Esq., Claimant's Attorney.

COMMUNIST PARTY, U. S. A., Employer,

by: JOHN J. ABT, Esq.

BEATRICE WARDLOW, Witness for the Employer.

[fol. 55] BENJAMIN WILKOFKY was interrogated and answered as follows:

By the Referee:

Claimant has not been credited with any earnings or employment with the Communist Party, U. S. A., because based on the opinion of the Attorney General, Louis J. Lefkowitz, in Attorney General Opinion 1, 1957, dated [fol. 56] January 29, 1957, the Attorney General has held that, in his opinion the employer is engaged in an enterprise which is illegal and has been declared by the Legislature to be against public policy. * * *

[fol. 57]

COLLOQUY BETWEEN REFEREE AND COUNSEL

The Referee: You mean you are relying entirely on the fact that the Attorney General has ruled it's illegal and against public policy and you don't propose to offer any evidence to substantiate the ruling of the Attorney General?

Mr. Wilkofsky: Regarding the employment with the Communist Party, that is our position, Mr. Referee.

[fol. 58] The Referee: Well, I think that you are expected to give evidence as to the fact that you worked in covered employment.

Mr. Vladeck: All right.

The Referee: To the extent that that involves the issue of legality of the employment, you are expected to give evidence. I might say this: that if the Commissioner doesn't offer any evidence with respect to the conclusions at which the Attorney General arrived, my decision in this case will relate solely to whether or not the Communist Party is, as a [fol. 59] matter of law, illegal and, therefore, whether or not employment by that party constitutes illegal employment, and that would have to be determined solely on the basis of statute law and adjudicated cases. I will not assume

the existence of any facts whatever that are not actually offered in evidence at this hearing.

[fol. 76] WILLIAM ALBERTSON was duly sworn, and testified as follo.

[fol. 79] By Mr. Wilkofsky:

[fol. 80] Q. Regarding your employment with the Communist Party, U. S. A., you say you worked for them for seven weeks from February 13 through March 30, 1956?

A. That's correct.

Q. In what capacity were you employed?

A. I was employed as assistant labor secretary.

Mr. Wilkofsky: I have no further questions of Mr. Albertson.

By the Referee:

Q. What were your duties as assistant labor secretary?

A. Well, to make a study of legislation dealing with labor, both in Congress as well as in the various states; make an analysis of these labor legislations; make summaries of them; see that they were distributed to the various state organizations of the Communist party for its information and to be used for the development of campaigns against anti-labor legislation such as the state right-to-work laws; to review the question of wages, wage trends; do research work on that and prepare summaries on these questions for use by the Communist Party in its work, generally along these lines.

[fol. 83] BEATRICE WARDLOW was duly sworn and testified as follows:

The Referee: You live at 984 Green Avenue in Brooklyn?

Mrs. Wardlow: That's right.

The Referee: All right, sir.

By Mr. Abt:

Q. What's your occupation at the present time, Mrs. Wardlow?

A. At the present time, housewife.

Q. And what was your occupation between February, 1956 and December, 1956?

A. I worked at the Communist Party two days a week. As far as payroll—I worked two days a week as a payroll clerk; handling other cash for the Communist Party.

[fol. 85] Q. Now, during the period of your employment, Mrs. Wardlow, did the Communist Party file returns and pay taxes under the Unemployment Insurance Law?

A. Yes.

Mr. Abt: I would like to offer in evidence, Mr. Referee, the—with the understanding that I can withdraw it on furnishing a photostat, as Communist Party Exhibit 1 the return filed by the Communist Party for the calendar quarter January 1, 1956, ending March 31, 1956, which has attached thereto the experience rating notice of the New York State Department of Labor, indicating that the age of the contributing employer is 20 years and I assume—I am not familiar with this form myself, but I assume that the 20-year age which appears on that experience rating form indicates that the Communist Party has been a contributing employer for 20 years—that is, since 1936, which was the date of the enactment of the Unemployment Insurance Law.

The Referee: All right. Any objection, Mr. Wilkofsky?

Mr. Wilkofsky: No objection.

[fol. 86] The Referee: Received as the Employer's Exhibit A.

Q. Just one other question, Mrs. Wardlow. To your knowledge; has the Communist Party filed returns and paid the tax under the Federal Unemployment Tax Act?

A. Yes, they have.

Mr. Wilkofsky: Mr. Referee, at this point, I will interrupt and concede that the Communist Party, U. S. A. was a

registered employer and paid unemployment insurance contributions to the fund.

The Referee: Gentlemen.

Mr. Abt: Will it also be conceded, Mr. Wilkofsky, they paid tax under the Federal Compensation Tax Act?

Mr. Wilkofsky: That I wouldn't know.

Mr. Abt: She has testified and you can—

The Referee: If her testimony isn't refuted, it's unrefuted testimony in the record.

[fol. 95] Mr. Abt: Thank you, Mr. Referee. Inasmuch as Mr. Wilkofsky has offered no evidence, what I have to meet, I take it, are only such matters of which you can take judicial notice because there is nothing else in the record before you.

The Referee: The contention is that as a matter of law the Communist Party is engaged in illegal activities, which makes its employees engaged in illegal employment.

[fol. 114]

BEFORE THE UNEMPLOYMENT INSURANCE REFEREE

MINUTES OF HEARING, DATED JUNE 3, 1957

Date of Hearing: June 3, 1957

[fol. 132]

COLLOQUY BETWEEN REFEREE AND COUNSEL

Mr. Wilkofsky: However, in the case of the Communist Party U. S. A., a determination was issued on March 26, 1956 in which the Commissioner held the employer's registration effective January 1, 1957, and indicated that the Commissioner would no longer accept contributions from that employer and the employer requested a hearing in a letter dated April 2, 1957. The Commissioner's basis for the determination in the Commissioner's case is based upon the opinion of the Attorney General Lewis J. Lefkowitz, which is dated January 29, 1957.

The Referee: All right.

[fol. 133] Mr. Wilkofsky: I have nothing further to offer, Mr. Referee, regarding that determination. That's it.

The Referee: Now, proceed with the other.

Mr. Wilkofsky: Now, Mr. Referee, I request again that the attorney and claimant and Mr. Vladeck leave the room since they have nothing to do with the Communist Party New York State case.

The Referee: The application is denied.

Mr. Wilkofsky: The determination was issued to the Communist Party New York State on March 26, 1957, cancelling their employer registration number effective January 1, 1957 and indicating that the Commissioner would no longer accept contributions from that employer, and the employer appealed from that determination in a letter dated April 4, 1957. In the determination in that case as well as based upon Attorney General's Lewis J. Lefkowitz, dated January 29, 1957—as a matter of fact, the opinion indicates that the Attorney General was asked his opinion as to whether employment with the Communist Party New York State or the Communist Party of the United States may form a basis for determining eligibility for unemployment insurance under the New York State Unemployment Insurance Law, and whether compensation under such law was subject to contributions under the Law. I have nothing further.

The Referee: Anything further from any other party?

Mr. Abt: I'd like to say, Mr. Referee, that I think Mr. Wilkofsky's summarization of the two determinations is quite inaccurate, but since they are both part of the record—

[fol. 134] The Referee: They speak for themselves.

Mr. Abt: Beyond that I have nothing to offer.

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[fol. 151]

EXHIBIT I OF COMMUNIST PARTY

[fol. 153]

DIVISION OF EMPLOYMENT

UNEMPLOYMENT INSURANCE ACCOUNTS BUREAU
800 North Pearl Street
Albany 1, N. Y.

*EXPERIENCE RATING NOTICE—1956

NEW YORK STATE DEPARTMENT OF LABOR

Division of Employment
Albany 1, N. Y.

[fol. 154] Size of Fund Index 9.8%

Employer Reg. No. 8670614

Employer's Account as of July 1, 1955 1058329

Factors

Age 20

Qtr. 15

Annual 00

Benefit 16

Experience Factor 195

Contribution Rate 07%

To be used

when reporting contributions due on the quarterly reports due on April 30, July 31, October 31, 1956 and January 31, 1957. Consult employer handbook for explanation of all items used on this notice.

8651-710

S-1-36

86-70614

COMMUNIST PARTY U S A

NATIONAL OFFICE

268 SEVENTH AVE NEW YORK 1 N Y

55

/s/ ISADOR LUBIN

ISADOR LUBIN

Industrial Commissioner

/s/ RICHARD C. BROCKWAY

RICHARD C. BROCKWAY

Executive Director

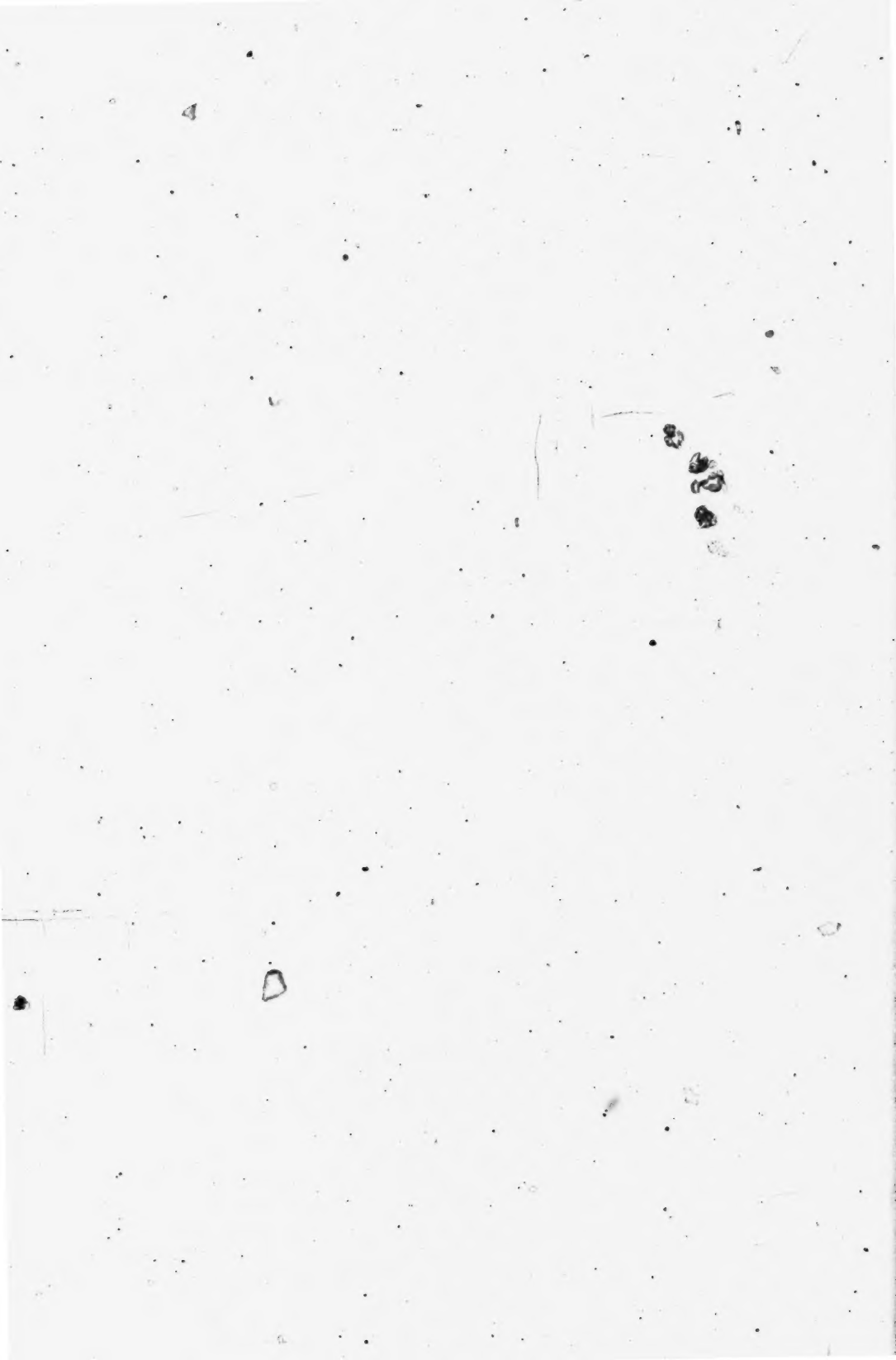
[fol. 164]

EXCERPTS FROM CLAIMANT'S EXHIBIT I

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
 Social Security Administration
 Office of Appeals Council

REFEREE'S DECISION

Claimant	Wage Earner	Account No.	Case No.	Claim For:
William E. Foster	William E. Foster	113-03-9222	NY-1798	Old-Age Benefits
A. Bittelman	A. Bittelman	057-12-2449	NY-1858	Old-Age Benefits
Jacob Mindel	Jacob Mindel	082-12-0632	NY-1889	Old-Age Benefits
Rebecca Mindel	Jacob Mindel	082-12-0632	NY-1889	Wife's Benefits
A. Wagenknecht	A. Wagenknecht	332-18-9545	C -1115	Old-Age Benefits
Charles A. Dirba	Charles A. Dirba	055-16-0583	NY-2175	Old-Age Benefits
Sadie V. Amter	Israel Amter	088-01-8982	NY-1924	Wife's Benefits
				Widow's Benefits
				Lump-Sum
				Old-Age Benefits



[fol. 166] The individual claimants in these cases filed applications for old age benefits, wife's benefits, and survivors benefits, as appropriate, at various times in the period beginning with January 1952, through May 1955. The Bureau, as a result of such applications, in determinations made between January 14, 1952, and August 22, 1955, awarded benefits based in whole or in part, on services performed by the wage earners in employment for the Communist Party. The Bureau disallowed the claim in the case of Alfred Wagenknecht on November 23, 1955, on the ground that he was not fully insured (a primary condition of entitlement) because service for the Communist Party is service excepted from the Social Security Act as service for a foreign government. Thereafter, the Bureau reopened all of the other cases, and after reconsideration, reversed the original findings to declare that none of the claimants was entitled to benefits based on service for the Communist Party, because the service was actually for a foreign government. It was also found further, that overpayments made, were recoverable by the United States, either by direct recovery or by adjustment against future benefits not based on service for the foreign government. The claimants requested a hearing because they disagreed with the Bureau determination.

Section 210(a)(11) of the Social Security Act, excludes from the term "employment", service performed in the [fol. 167] employ of a foreign government (including services as a consular, or other officer or employees, or a non-diplomatic representative).

Section 210(a)(12) of the Social Security Act, also excludes from the term "employment", service performed in the employ of an instrumentality wholly owned by a foreign government, but only if the service is of a character similar to that performed in foreign countries by employees of the United States, or an instrumentality of the United States, and the Secretary of State certifies to the Secretary of the Treasury, that the foreign government for which the exception is claimed, grants an equivalent exemption to the United States Government.

The law is clear that service for the Communist Party is not excepted from employment. Employment for and

wages from the Communist Party, would form the basis for social security benefits.

In the cases before the referee, it does not appear, and there is no contention, that the conditions pertaining to the exception of service for an "instrumentality" of a foreign government have been met, so that if the wage earners in this case are found to have performed service for an "instrumentality" of a foreign government, or for the Communist Party, such service was not excepted from coverage under the Social Security Act. Only if the wage earners were direct employees of a foreign government can their service be found to be excepted.

The evidence shows that all of the wage earners were allegedly employed by one or more of the following organizations. They are referred to as "The Communist Party, U. S. A.", "The Communist Party", "The Communist Political Association", "The State Committee, Communist Party", "The New York State Committee, Communist Party", "The Communist Political Association of New York State", "The Communist Party of New York State", or, in the case of Alfred Wagenknecht, "The Communist Party of Illinois". All of the foregoing organizations are part of the overall organization known as "The Communist Party", past or present, and a finding as to the identity of the actual employer in one instance is applicable to all of the cases. It is alleged, on behalf of the Bureau, that all of the wage earners were direct employees of the Union of Soviet Socialist Republics, a foreign government more commonly known as the "Soviet Union".

At the hearing, there appeared one witness on behalf of the Bureau, to give oral testimony. Numerous books, pamphlets and other documents were received into evidence, dealing with the subject of Communism abroad and in the United States.

Nowhere in the record of this case, is there any direct evidence, either oral or documentary, that persons allegedly working for the Communist Party in the United States are "employees" of the Soviet Union. No witness and no document even mentions such a relationship. To determine whether the employer-employee relationship existed, there-

fore, between the wage earners and the Soviet Union, it becomes necessary to examine all of the evidence carefully [fol. 169] to determine whether such a relationship of employer-employee may be fairly inferred. To do so, the referee intends to apply the same rules for determining the employer-employee relationship, or for determining the identity of an employer, as have always been used for social security purposes, and which have been set out in specific provisions of the Social Security Act.

The referee firmly rejects the implications of the suggestion made on behalf of the Bureau that "The Congress * * * had made it abundantly clear * * * the Communist Party of the United States is to be accorded nothing but harsh treatment * * *". Such language would seem to invite the referee to deal harshly with the claimants in an arbitrary way, rather than to be scrupulous in applying the law as it was enacted by Congress. Communism envisages the "dictatorship of the proletariat." Dictatorships of any description become the rule of men rather than government by law. One of our most priceless American heritages, is our devotion to government by law, so that justice is meted out, not in accordance with personal views, prejudices, or subjective standards of right or wrong, but strictly in accordance with the laws which we accept from our chosen representatives. Democracy provides constitutional due process to our enemies, as well as our friends, and guarantees equal protection of the law to all. In reference to the attitude of Congress toward Communism, as expressed in other legislation, and to which the referee will refer later, the referee will point out here that although the subject of Communism has been frequently considered by the Congress, and although there have been frequent and major [fol. 170] studies and revisions of the Social Security Act by the Congress in the past two decades, nowhere in the Committee Reports on Social Security legislation, has the Congress suggested that service for the Communist Party in the United States was or should be considered excepted service. Indeed, the Social Security Act, as amended in 1954, in Section 202(n) provides for disqualification in the case of certain individuals deported as Communists, under

the Immigration and Nationality Act, but does not extend such disqualification to employees of the Communist Party in the United States.

Much of the documentary evidence submitted to the referee was neither helpful nor appropriate in determining the question as to the actual employer of the wage earners in this case. The works of Communist writers, such as Karl Marx, Friedrich Engels, Lenin, Stalin, Dimitroff, J. Peters, as well as Communist literature concerning the Communist International and the World Congresses, were helpful in understanding the vicious nature of the conspiracy against the government of the United States, and against the other democratic countries of the world, but taken together they tended to prove that the wage earners were *not* employees of the Soviet Union, a development which is the opposite of the one intended by the submission of such documents. Prior to submitting evidence and in setting out the position of the Bureau, it was stated that what the Bureau proposed to show "is that this is a vast world-wide conspiracy in which various members and various claimants have joined, and that whereas they state they were employed by the Communist Party of the United [fol. 171] States, they were actually employed in the world-wide conspiracy and were more subservient to the Russian Communist Party than the Communist Party of the United States." It should be observed here, that shocking as such a fact might seem, membership in an international conspiracy to overthrow the government of the United States by force and violence or "subservience" to the Russian Communist Party, and even "loyalty" to the Soviet Union, does not, in itself, disqualify an individual from social security benefits under the law. Unless the service as an employee is specifically excepted by the law, it will form the basis for benefits. Therefore, unless "subservience" to the Russian Communist Party, or membership in a "world-wide conspiracy", or even loyalty to the Soviet Union, is coupled with actual "employment" by the Soviet Union, work for the Communist Party in the United States is covered employment. Loyalty to the Soviet Union is no

more a disqualifying factor in itself, than loyalty of resident aliens to Britain or any other foreign country.

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[fol. 187] The referee has carefully considered all of the foregoing evidence, and all of the other evidence in this case, and finds that the evidence does not permit the conclusion that the wage earners in these cases were employees of the Soviet Union. The overwhelming weight of the evidence requires a finding, and the referee does find, that the wage earners were employees of the Communist Party, U. S. A., or one of its subordinate organizations. There is not sufficient evidence to determine whether the Communist Party, U. S. A., is a creature or instrumentality of the Soviet Union, the Russian Communist Party, or the Communist International, although it is clear that it is dominated by alien elements from abroad, and that it is conspiratorial in character. To decide these cases, it is not necessary for the referee to reach conclusions as to the organization pattern of the conspiracy against the United States Government in foreign countries.

[fol. 188] In view of the referee's findings that the Communist Party, U. S. A., is a distinct recognizable entity, it is an employer if in its relationship to the individuals performing service for it, they have the status of employees under the usual common-law rules. The evidence in the case clearly establishes that the Communist Party, U. S. A., has an existence distinct from foreign organizations. The Internal Revenue Service has, for almost 20 years, recognized such status by collecting from it, taxes imposed on employers. . . .

[fol. 189] If disposing of these cases, the referee has come to his conclusions solely on the merits of the cases under the law. Many have expressed violent antipathy toward Communism, and have suggested that Communists are entitled to no benefits or protection under the laws of the United States. Shortsighted people might have applauded the referee had he decided the cases against the claimants on the ground that the service on which the benefits were based, was performed by Communists actually employed in

a conspiracy to overthrow the government of the United States by force or violence. As suggested earlier, however, while the referee would wholly agree that Communists should not profit from their subversive acts, punitive action may be taken only legally, that is, under the laws enacted by Congress. The procedure must be constitutional. The referee has neither the right to make laws, nor to take action contrary to law. The referee hopes his decision will illustrate to the misguided individuals who would embrace the horror of Communism, that government by law, available for all, friend and foe alike, is vastly superior to the rule of oppression and terror by a Communist dictator, whose only law may be personal whim or ambition.

For all of the foregoing reasons, the referee accordingly concludes that the service of the wage earners in these cases, was employment for the Communist Party, U. S. A., an employer, or one of its subsidiaries. Such service was not excepted by Section 210(a)(11) of the Social Security [fol. 190] Act. Their remuneration, therefore, was wages creditable to their accounts.

It is the decision of the referee that the claimants are entitled to benefits based on the service of the wage earners for the Communist Party, U. S. A., or for one of its subordinate bodies.

/s/ PETER J. HOEGEN,
Peter J. Hoegen, Referee

Date: June 21, 1956

[fol. 200]

IN THE NEW YORK SUPREME COURT
APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

In the Matter
of

The Claim for Benefits under Article 18 of the Labor Law,
made by WILLIAM ALBERTSON, Claimant-Appellant,
ISADOR LUBIN, as Industrial Commissioner, Respondent.

In the Matter
of

The Liability for Unemployment Insurance Contributions
under Article 18 of the Labor Law of COMMUNIST PARTY,
U. S. A. and COMMUNIST PARTY OF NEW YORK STATE,
Employers-Appellants,
ISADOR LUBIN, as Industrial Commissioner, Respondent.

MEMORANDUM DECISION OF APPELLATE DIVISION,
THIRD DEPARTMENT

Appeals from decisions of the Unemployment Insurance
Appeal Board.

Claimant-appellant Albertson was employed by the Communist Party, U. S. A., as an assistant labor secretary [fol. 201] and testified that his duties were the study of wage trends in the labor movement and preparation of analyses of proposed labor legislation. On July 16, 1956, being unemployed, he filed a claim for unemployment insurance benefits, stating that part of the base period to qualify him for benefits was in employment with the Communist Party; and part with other employers. The Industrial Commissioner denied claimant benefits and suspended the registrations of the national and state Com-

munist parties as contributing employers. On Appeal, the Unemployment Insurance Appeal Board affirmed the determinations. The reason for the suspension of the parties is that they constituted a criminal conspiracy and had been outlawed by Congress in the Communist Control Act (68 Stat. 775; 50 U. S. C. A. 841), which enacted (section 3) that the Communist Party is "not entitled to any of the rights, privileges, and immunities attendant upon legal bodies * * * and whatever rights, privileges and immunities which have heretofore been granted * * * are terminated".

The proof is that for twenty years the State Department of Labor had accepted unemployment contributions from the parties (national and state) and the record shows that tax payments under the Federal Unemployment Tax Act are currently being paid by the two Communist parties to the U. S. Bureau of Internal Revenue. No criminal or conspiratorial act is shown in the record as to the claimant's actual work for the Communist Party. The basis of his disqualification is that all the employer's activities are outlawed.

[fol. 202] The record demonstrates that the Federal government has not taken any steps to deprive the Communist Party of an ability to perform certain functions of existence, such as renting an office, hiring employees, using the post office or obtaining telephone service in pursuance of the Communist Control Act of 1954. No doubt the State of New York could take such steps in this direction as it might deem warranted. But having permitted the Communist Party to hire and pay the claimant as an employee and to have and maintain offices and to permit claimant to work in its offices, and to file and pay unemployment insurance taxes, the benefits of such payments should be paid in accordance with law.

Besides this, the claimant himself is not shown on the record to be deprived by any law of the United States or of the State of New York of unemployment insurance benefits. No personal disability arising from any personal criminal activity in which he took part is shown in the record to arise from any statute, nor is it demonstrated he is outlawed or deprived of civil rights.

As far as the employer is concerned the requirement to pay an unemployment insurance tax is not an "immunity and right" within the Federal statute, where the employer has been allowed by the State to exist and has been allowed the exercise of other forms of existence, and we see no reason grounded in law why it should not pay the usual tax.

We do not hold that the State may not prevent the Communist Party from engaging in any activity of existence, such as hiring employees or renting quarters; nor do we [fol. 203] hold that if a particular hiring is itself shown to be criminal in the actual employment, that the employee is then entitled to benefits for the period of such employment. But if the State permitted the employer to hire employees, with knowledge derived from the payment of taxes and reports made for many years that such employees were hired and working, there seems no legal ground for not applying the tax and granting the benefits as provided by law. This is not based on a principle of estoppel, but is a statutory effect of allowing the employment and taking the tax based on it. If it were demonstrated that a specific employment were criminal as distinguished from a status attaching to the employer itself, a different result might become permissible as to the claim for benefits arising from such an employment, but that is not the showing of the reason.

Decision reversed without costs and claim remitted to the Unemployment Insurance Appeal Board for further proceedings.

Foster, P. J., Bergan, Gibson, Herlihy and Reynolds, JJ., concur.

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of the Claim of WILLIAM ALBERTSON,
Respondent.

ISADOR LUBIN, as Industrial Commissioner, Appellant.

In the Matter of COMMUNIST PARTY, U. S. A., et al ,
Respondents.

ISADOR LUBIN, as Industrial Commissioner, Appellant.

OPINION—May 26, 1960

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Chief Judge DESMOND. Two separate but related questions arise in this consolidated proceeding. We are first to decide whether, on the theory that his employment by the Communist Parties (N. Y. and U. S. A.) was not "covered employment", respondent Albertson is ineligible for unemployment insurance benefits. Second, we must determine whether the Industrial Commissioner was legally justified in suspending the registration of the Communist Parties themselves as "employers" within the meaning of the Unemployment Insurance Law.

We agree with the Appellate Division that Albertson is not to be denied an unemployment insurance award solely because part of his base period of employment was with the Communist organizations. Nothing was proven beyond that bare fact. There is no statute or other precedent disqualifying him from coverage. His work with the Communist organizations was not shown to have been criminal, conspiratorial or traitorous. Despite the equivocal status and illegal purposes of his employer, his own contract of hiring (unlike that in *Matter of Clarke v. Town of Russia*, 283 N. Y. 272) was not so completely illegal as to prohibit unemployment insurance coverage. It would be unreasonably punitive to hold that, because the employer who paid unemployment taxes for him was engaged in an

anti-American conspiracy, Albertson must lose his insurance. Since the striking of the parties from the list was [fol. 205] as of March 26, 1957, there is no inconsistency in protecting the insurance rights of Albertson whose employment ended before that date.

As to the alleged rights of Communist Parties to recognition and listing, however, we disagree with the Appellate Division. The Industrial Commissioner in performing his statutory duty (Labor Law, § 571) of computing and collecting these taxes had necessarily to decide who were "employers" under the act (*Matter of Electrolux Corp.*, 286 N. Y. 390, 397). In so doing, he could not ignore the Federal Communist Control Act (U. S. Code, tit. 50, § 842) which declared that the Communist Party is "not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof are terminated". We take that plain declaration and its absolute language to mean what it says, although we find no decisions construing it in this connection. It necessarily means that the artificial body or entity calling itself the Communist Party is to be deprived of all the "rights, privileges, and immunities" that other such entities have. The Appellate Division dealt with this statutory language by saying that the requirement of paying an unemployment insurance tax is not an "immunity or right" where the employer has been allowed by the State to exist, has in fact been allowed the exercise of other privileges and where no reason is shown why it should not pay this tax. Of course, paying a tax is not really claiming an "immunity" or "right" but with the payment of this particular tax goes a status and enrollment as an employer. Whatever value that status may have is being sought and claimed by the Communist Parties in this proceeding.

The State officers of New York, reading literally the Federal statute, have deprived the Communist Parties of their former places on the State's official roll of employers.

The Federal Government, although charged with the enforcement of its own Communist Control Act, is, we are told, still collecting unemployment insurance taxes from the Communist Parties. What the reason is for this position we do not know and there is not enough in the record to prove any binding Federal administrative construction of the Federal act. We know that the Communist Parties are allowed to use the mails, list themselves in the telephone books, hold public meetings and write letters to magazines (see *Harper's* for May, 1960, pp. 6-8, communication signed by the party's "National Educational Secretary"). But we are not here determining whether the reports of the demise of these organizations are exaggerated. The situation in our court is that these Communist Parties are demanding that they be restored to this State's list of employers. They come as unincorporated groups claiming rights or privileges but all rights of unincorporated associations are created by and dependent upon the State. The Appellate Division recognized in its opinion that the State might by appropriate steps prevent the Communist Parties "from engaging in any activity or existence". We think that the State of New York has already done so. The Attorney-General, its highest law officer, argues to us on this appeal that the unemployment insurance officers acted validly in denying further recognition to the Communist Parties.

We accept none of the arguments that this Federal Communist Control Act is unconstitutional. We do not think that it is a bill of attainder or ex post facto legislation. We see no denial of due process in the deprivation of these organizations of their status without a hearing. Section 841 of title 50 of the United States Code contains a Congressional finding that the Communist Party is not really a political party but "in fact an instrumentality of a conspiracy to overthrow the Government of the United States", that it is dedicated "to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including a resort to force and violence", and that as an agency of a hostile foreign power it is "a clear present and continuing danger to the security of the United States." Sim-

ilar pronouncements are found in a number of decisions of this court and of the United States Supreme Court (see *Dennis v. United States*, 341 U. S. 494, 547; *Matter of Lerner v. Casey*, 2 N Y 2d 355, 372, affd. 357 U. S. 468). These are not mere flats or rhetorical flourishes but recognitions by courts and Congress of facts that are so well established and known that recognition of them without further proof is a right and duty (see *East New York Sav. Bank v. Hahn*, 293 N. Y. 622, 627, affd. 326 U. S. 230).

The administrative determination suspended the registration of the Communist Parties as of March 26, 1957 and the State has not accepted any reports or payment of contributions since that date. Since Albertson's employment was earlier than that date there is no difficulty as to him. If there are or will be unemployment insurance problems as to other employees of these Communist Parties, decision on those problems will have to wait until the claims, if any, are presented in the usual way. Many corporations and bodies are considered not to be employers under the act (see Labor Law, § 560, subd. 4) and presumably their employees are aware of it.

The order of the Appellate Division should be modified by reversing so much thereof as sets aside the suspension of the registration of the employers-respondents and the [fol. 207] decision of the Unemployment Insurance Appeal Board in this connection reinstated, otherwise the Appellate Division order should be affirmed, with costs to claimant-respondent against the Industrial Commissioner.

FULD, J. (dissenting). This is a curious case; a taxpayer, the Communist Party, resists exemption from taxes, while the State, through its Industrial Commissioner, insists on thrusting such an exemption upon it.

The unemployment insurance system, a joint federal-state undertaking, provides benefits for persons involuntarily unemployed to be financed by an excise tax on employers (see U. S. Code, tit. 26, § 3301 *et seq.*; Labor Law, art. 18). Having lost his job with the Parkside Delicatessen, following earlier employment with the Communist Party, U. S. A., the respondent Albertson applied for such benefits under this State's Unemployment Insurance Law (Labor

Law, art. 18).¹ Although the Party had paid to the State all unemployment insurance contributions required to be paid and had for many years made, and is currently making, tax payments to the United States Bureau of Internal Revenue under the Federal Unemployment Tax Act, the Industrial Commissioner decided that it was not subject to the tax and that, on this account alone, Albertson was not entitled to unemployment benefits.

This result is sought to be supported by reference to the Federal Communist Control Act of 1954 and by contentions about the nature of the Communist Party and the constitutional powers of the Federal and State Governments to deal with it. But, under settled and salutary principles of adjudication, courts avoid decision on such large matters—here, not free of difficulty (see Auerbach, *The Communist Control Act of 1954*, 23 U. of Chi. L. Rev. 173, 183 *et seq.*; see, also, Remarks of Representative E. Celler, during House debate, 100 Cong. Rec. 14643)—unless they are necessary for a disposition of the issues presented. There is no such necessity in this case; decision of the issues now before us depends solely on the answer to one simple question of statutory construction. Is the Communist Party an “employer” subject to unemployment insurance taxes? If it is, the Appellate Division was correct, and its order reversing the Industrial Commissioner’s determination must be affirmed.

The New York Unemployment Insurance Law, having its origin in the Federal Social Security Act of 1935 (U. S. Code, tit. 42, § 301 *et seq.*), defines an “employer”, in exceedingly broad terms, as “any person, partnership, firm, [fol. 208] association, public or private” (Labor Law, § 512). Absent an overriding legislative proscription, it is admitted, the Communist Party is an employer within the meaning of our statute, and is liable to pay taxes under the provisions of section 560. But, says the Industrial Commissioner, since 1954, the Federal Government, by enactment of the Communist Control Act (U. S. Code, tit. 50, § 841 *et seq.*), has prevented the Communist Party

¹ His employment with the Communist Party has been treated as essential to qualify him for such benefits.

from being an employer with the consequence that it is not subject to unemployment insurance taxes and its employees are not entitled to any benefits under our Unemployment Insurance Law.

This contention is unreasonable. In the first place, it is significant that the federal authorities, admittedly aware of the Industrial Commissioner's position, have taken one diametrically opposed and continue to recognize the Communist Party as an employer subject to the Federal act. And, although determination of the persons who fall within the class of employers subject to the state tax may not be a matter of federal law, there can be no doubt of the desirability, indeed, of the "obvious necessity of harmonizing where possible, our state [unemployment insurance] law with the federal acts". (*Pioneer Potato Co. v. Division of Employment Security*, 17 N. J. 543, 549, per BRENNAN, J.) In the second place, the Communist Control Act, relied upon by the Commissioner, may not, in any event, be read to support the determination which he made in this case.

That the Unemployment Insurance Law of New York, as well as of the other states, and the Federal Unemployment Tax Act (U. S. Code, tit. 26, §§ 3301-3308) make up a "coordinated scheme" (*Buckstaff Co. v. McKinley*, 308 U. S. 358, 364) is obvious from the merest perusal of the statutes concerned (see, especially, U. S. Code, tit. 26, §§ 3302, 3306; U. S. Code, tit. 42, § 503; Labor Law, §§ 530, 532, 536, 560, subd 1, par. [c]) and has been the subject of judicial observation not only in this court, but in numerous other courts. (See, e.g., *Matter of Lazarus [Corsi]*, 294 N. Y. 613, 618; *Buckstaff Co. v. McKinley*, 308 U. S. 358, 363-364, *supra*; *Lines v. State of California*, 242 F. 2d 201, 203, cert. denied 355 U. S. 857; *Scripps Mem. Hosp. v. California Employment Comm.*, 24 Cal. 2d 669, 677; *Arnold Coll. v. Danaher*, 131 Conn. 503, 507; *Stromberg Hatchery v. Iowa Employment Security Comm.*, 239 Iowa 1047, 1051; *Pioneer Potato Co. v. Division of Employment Security*, 17 N. J. 543, 547, *supra*.) Thus, we are told on

² Paragraph (c) of subdivision 1 of section 560 does not appear in the recodification which took effect in January of 1960.

the highest authority that "it would seem to be a fair presumption that the purpose of Congress was to have the state law as closely coterminous as possible with its own. To the extent that it was not, the hopes for a coordinated and integrated dual system would not materialize." (*Buckstaff Co. v. McKinley*, 308 U. S. 358, 364, *supra*.) Perhaps, the strongest indication that "The administration of the [fol. 209] branch of federal security which deals with [unemployment compensation] and the administration of the state laws [dealing with the same subject] constitute a single system" (*Arnold Coll. v. Danaher*, 131 Conn. 503, 507, *supra*), is provided by the fact that our Legislature itself prescribed, as one of the conditions of liability for contributions under our law, that an employer is "liable for tax under the provisions of the federal unemployment tax act" (Labor Law, § 560, subd. 1, par. [c]).³

Notwithstanding these overwhelming indications that the state and federal unemployment compensation provisions should be administered, insofar as possible, as one act, the Industrial Commissioner has refused so to consider them. He admits that the federal authorities, despite the statutes on which he relies and despite their awareness of his position, continue to deal with the employer respondents herein as "liable for tax under the provisions of the federal unemployment tax", but he insists that his judgment should not be controlled by their determination. There is no warrant for this position in the statute which he administers. The necessity to achieve "a coordinated and integrated dual system" (*Buckstaff Co. v. McKinley*, 308 U. S. 358, 364, *supra*) represents so strong a state and federal legislative policy that the Industrial Commissioner should have concluded that, as long as an employer is treated by the federal authorities as subject to the federal unemployment tax, it is liable for contributions under our Unemployment Insurance Law, unless, of course, our own statute embodies an express provision to the contrary.

³ As noted in footnote 2, this paragraph does not appear in the recent recodification of section 560 which became effective January 1, 1960. It seems to have been omitted for technical considerations and without any regard to underlying policy.

(See *Matter of Lazarus [Corsi]*, 294 N. Y. 613, 618, *supra*; see, also, cases cited, *supra*, p. 87; cf. *Matter of Marx v. Bragalini*, 6 N Y 2d 322, 333; *Matter of Weiden*, 263 N. Y. 107, 110.) As was said by the Connecticut Supreme Court, "Unless the provisions of the state [unemployment insurance] statute clearly differ from those of the federal act, it must be assumed that the legislature intended that they be interpreted alike, and this is particularly true with reference to those which determine the persons who are obligated to make contributions." (*Arnold Coll. v. Danaher*, 131 Conn. 503, 507, *supra*.) Especially is this so where the only basis for the Commissioner's position is his interpretation of a federal statute.

In short, a determination by the federal authorities that, despite the Federal Communist Control Act, the Communist Party is an employer subject to registration and tax under the Federal Unemployment Tax Act (U. S. Code, tit. 26, § 3301 *et seq.*) requires a like decision by the Industrial [fol. 210] Commissioner. Even were this not so, however, I would, nevertheless, regard the Commissioner's ruling as unreasonable since it rests on a mistaken reading of the Communist Control Act. Insofar as relevant that statute (U. S. Code, tit. 50) recites in section 842:

"The Communist Party of the United States * * * [is] not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party * * * are hereby terminated".

Whatever else this legislation may mean, it may not be taken to affect the "liability [of] any employer * * * for contributions" under our Unemployment Insurance Law (Labor Law (art. 18, § 560). This, it seems obvious, necessarily follows from the fact that, whereas the act cuts off "rights, privileges and immunities", the status of an employer under the Unemployment Insurance Law involves, and is expressly denominated, a "liability" (see, e.g., Labor Law, §§ 560, 561, 562, 570; 572, 579), a duty to pay an

"excise tax." (*Matter of Cassaretakis*, 289 N. Y. 119, 127, affd. 319 U. S. 306; see, also, *Matter of Burke*, 267 App. Div. 127, 130.) Certainly, a deprivation of "immunities" may not be read to *confer* an immunity from taxation and, just as surely, a loss of "rights" and "privileges" can hardly be said to *grant* a freedom from the obligation to pay a tax. Taxation is an intensely practical business, and the courts do not deal in riddles in interpreting tax statutes.

There are surely better ways of dealing with the problems posed by communism and the Communist Party than by forced and unreal construction of statutes designed to serve entirely different purposes. The plain fact is that our Unemployment Insurance Law was enacted to benefit the "unemployed worker" (Labor Law, § 501), not the employer, and it is the latter who is burdened with a tax in order to fulfill the purposes of the statute. The imposition of such a burden upon the Communist Party as employer cannot possibly be deemed the sort of "right" or "privilege" denied to the Party by the Communist Control Act. If Congress had been intent upon depriving the Communist Party of its ability to enter into contracts or hire employees, it could easily and unmistakably have so provided. And, if our Legislature desired to prevent employees of the Communist Party from receiving unemployment insurance benefits, it could, I assume, have done so, but, in the absence of such legislation, the Industrial Commissioner may not bring about this result simply by coining a new legal concept, a privilege new to our law, "the privilege to pay taxes".

[fol. 211] This disposes of the proceeding brought by the respondent employer; the Communist Party is subject to registration and taxation as an employer under the Unemployment Insurance Law. And, that being so, it follows that the Appellate Division was also correct in holding, in the proceeding instituted by the respondent Albertson, that he had met all qualifications under the law and was entitled to unemployment benefits.

I would affirm the order appealed from in all respects.

VAN VOORHIS, J. (concurring in part). If the Communist Party in the United States is "the agency of a hostile

foreign power" and "an instrumentality of a conspiracy to overthrow the Government of the United States" as the Congress of the United States has determined (U. S. Code, tit. 50, § 841), on account of which it has been "outlawed" and declared not to be "entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof?" (*id.*, § 842), then it cannot be recognized as a legitimate employer or its servants as legitimate employees. It has no living legal tissue. It enjoys neither the identity nor the rights, privileges or immunities of a legal organization. Unless these findings by the Congress are idle words, it lacks the power to make contracts and cannot enter into the relationship of employer and employee. No agency of a foreign power or its subsidiary organizations can have a legal status as part of "an authoritarian dictatorship within a republic," as the Communist Control Act says, certainly where its reason for existence is that which is above stated. Taxation does not make it legal (*United States v. Yuginovich*, 256 U. S. 450, 462; *United States v. Stafoff*, 260 U. S. 477, 480; *United States v. One Ford Coupe*, 272 U. S. 321, 326).

These conclusions are in accord with the majority opinion insofar as it upholds the suspension of the registration of the Communist Party—State and national—but not in regard to the allowance of unemployment insurance to Albertson. In our view the order of the Appellate Division should be reversed in its entirety and the determination of the Unemployment Insurance Appeal Board reinstated.

Judge DYE concurs with Chief Judge DESMOND; Judge FELD dissents in part and votes to affirm the order appealed from in all respects in an opinion in which Judge FROESSEL concurs and except Judge VAN VOORHIS who concurs in part but votes to reverse the order appealed from and to reinstate the determination of the Unemployment Insurance Appeal Board in an opinion in which Judge BURKE concurs; Judge FOSTER taking no part.

Order of the Appellate Division modified in accordance with the opinion herein and, as so modified, affirmed, with costs to claimant-respondent against the Industrial Commissioner.

[fol. 212]

IN THE COURT OF APPEALS OF STATE OF NEW YORK

REMITTITUR—May 26, 1960

[fol. 213]

No. 409

In the Matter of theClaim for Benefits Under Article 18 of the Labor Law
made by WILLIAM ALBERTSON, Respondent,

vs.

ISADOR LUBIN, as Industrial Commissioner, Appellant,

(and another proceeding Communist Party, U.S.A. and
Communist Party of New York State).

Be It Remembered, That on the 15th day of December in the year of our Lord one thousand nine hundred and fifty-nine, Isador Lubin, as Industrial Commissioner, the appellant in these causes, came here unto the Court of Appeals, by Louis J. Lefkowitz, Attorney General, and filed in the said Court Notices of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And William Albertson, and Communist Party, U. S. A. and Communist Party of New York State, the respondents in said causes, afterwards appeared in said Court of Appeals by Vladeck & Elias, and John J. Abt, their respective attorneys.

Which said Notice of Appeal and the Return thereto, filed as aforesaid, are hereunto annexed.

[fol. 214] Whereupon, The said Court of Appeals having heard this cause argued by Julius L. Sackman, of counsel for the appellant, and by Mr. Stephen C. Vladeck, of coun-

sel for the claimant-respondent, and by Mr. John J. Abt, of counsel for the employers-respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be, and the same hereby is modified in accordance with the opinion herein and, as so modified affirmed, with costs to claimant-respondent against the Industrial Commissioner.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Third Judicial Department, there to be proceeded upon according to law.

[fol. 215] Therefore, it is considered that the said order be modified &c., as aforesaid,

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Third Judicial Department,

Before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office,
Albany, May 26, 1960.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon, Clerk.

[fol. 216]

IN COURT OF APPEALS OF STATE OF NEW YORK

[Title omitted]

ORDER AMENDING REMITTITUR—July 8, 1960

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the employers-respondents Communist Party, U.S.A., and Communist Party of New York State herein and papers having been submitted thereon and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Whether section 3 of the Communist Control Act of 1954 may be construed as terminating the right of the employers-respondents, Communist Party, U.S.A. and Communist Party of New York State, to be "employers" within the meaning of the New York Unemployment Insurance Law; whether, if so construed, section 3 of the Communist Control Act of 1954 is a bill of attainder or ex post facto law forbidden by Article 1, Section 9, Clause 3 of the United States Constitution, or violates the First Amendment or the due process clause of the Fourteenth Amendment to the United States Constitution, or is beyond the constitutional power of Congress to enact, and whether the action of appellant as Industrial Commissioner in suspending the registrations of the employers-respondents as employers under the Unemployment Insurance Law denied them due process of law [fol. 217] or the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. The Court of Appeals held that section 3 of the Communist Control Act of 1954 as

construed by it was constitutional, and that the action of the Industrial Commissioner in no way violated or deprived respondents of their constitutional rights.

And the Appellate Division of the Supreme Court, Third Judicial Department, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

Gerron Kimball, Deputy Clerk.

[fol. 218]

SUPREME COURT OF THE UNITED STATES

No., October Term, 1960

COMMUNIST PARTY, U.S.A., et al., Petitioners,

v.

ISADOR LUBIN, as Industrial Commissioner.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI—July 15, 1960

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 24, 1960.

Felix Frankfurter, Associate Justice of the Supreme
Court of the United States.

Dated this 15th day of July, 1960.

[fol. 219]

SUPREME COURT OF THE UNITED STATES

No. 495, October Term, 1960

COMMUNIST PARTY, U. S. A., et al., Petitioners,

vs.

ISADOR LUBIN, as Industrial Commissioner.

ORDER OF SUBSTITUTION—December 12, 1960

On Consideration of the motion for leave to substitute Martin P. Catherwood in the place of Isador Lubin as the party respondent in this case,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

December 12, 1960

[fol. 220]

SUPREME COURT OF THE UNITED STATES

No. 495, October Term, 1960

COMMUNIST PARTY, U. S. A., et al., Petitioners,

vs.

MARTIN P. CATHERWOOD, as Industrial Commissioner.

ORDER ALLOWING CERTIORARI—December 12, 1960

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

7
FILE COPY

Office-Supreme Court, U.S.

FILED

OCT 20 1960

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. 495

COMMUNIST PARTY, U. S. A. and COMMUNIST
PARTY OF NEW YORK STATE,
Petitioners,

v.

ISADOR LUBIN, as Industrial Commissioner.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF NEW YORK**

JOHN J. ABT,

320 Broadway,

New York 7, N. Y.,

Attorney for Petitioners.

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IN THE
Supreme Court of the United States

October Term, 1960

No.

**COMMUNIST PARTY, U. S. A. and COMMUNIST PARTY OF
NEW YORK STATE,**

Petitioners,

v.

ISAIDOR LUBIN, as Industrial Commissioner.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF NEW YORK**

Communist Party, U. S. A. (herein called the "National Party") and Communist Party of New York State (herein called the "State Party") petition that a writ of certiorari issue to review a judgment of the Court of Appeals of New York (Appendix B hereto) reversing an order of the Appellate Division, Third Department, of the Supreme Court of New York and reinstating a determination of the respondent Industrial Commissioner suspending the registrations of petitioners as contributing employers under the New York Unemployment Insurance Law, (Labor Law, secs. 500 *et seq.*, Consolidated Laws, Chap. 31, Art. 18).

Opinions Below

The prevailing and dissenting opinions of the Court of Appeals are reported in 8 N. Y. 2d 77. The opinion of the Appellate Division is reported in 8 App. Div. 2d 918. All of the opinions appear in Appendix A hereto.

Jurisdiction

The judgment of the Court of Appeals is dated and was entered on May 26, 1960. On July 15, 1960, an order was entered by Mr. Justice Frankfurter extending the time for filing a petition for certiorari to and including October 24, 1960. Jurisdiction of this Court is conferred by 28 U. S. C. 1257.

Questions Presented

1. Whether the Court of Appeals erred in construing section 3 of the Communist Control Act of 1954, 50 U. S. C. 842, as depriving petitioners of the status of contributing employers under the New York Unemployment Insurance Law.

2. Whether the Court of Appeals erred in deciding that section 3 of the Communist Control Act, on its face and as construed and applied, does not violate the Constitution of the United States.

3. Whether the Court of Appeals erred in deciding that the action of the respondent Industrial Commissioner in suspending the registrations of petitioners as contributing employers under the New York Unemployment Insurance Law did not deny petitioners due process of law and the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Statutes Involved

The pertinent provisions of the Communist Control Act of 1954 and the New York Unemployment Insurance Law appear in Appendix C.

Statement of the Case

On March 26, 1957, the respondent suspended the registrations of petitioners as contributing employers under the New York Unemployment Insurance Law and directed that no further payment of contributions be made by them (R. 48, 51).¹ This action followed a ruling by respondent that a former employee of the National Party, Albertson, was not entitled to unemployment insurance benefits based on his employment by it (R. 44).

Administrative review of the respondent's action suspending petitioners and denying Albertson's claim for benefits was had in statutory proceedings before an unemployment insurance referee who consolidated the cases for hearing (R. 19).

At the hearing, respondent did not contend that his rulings were made pursuant to any provision of the Unemployment Insurance Law or other state statute. Nor did he offer evidence in support of his position. Instead, he relied exclusively on an opinion of the New York Attorney General on which his rulings had been based (R. 57). This opinion (Appendix C hereto) cites sections 2 and 3 of the Communist Control Act (50 U. S. C. 841, 842) and other legislative and judicial characterizations of the petitioners and concludes that "the Communist Party is a conspiracy against the Government of the United States and of this State," and therefore "it would be an anomaly in law, not to say amoral and against public policy, for the Communist Party and its employees to be permitted to enjoy the advantages and benefits of this public insurance program."

Albertson testified that he had been employed by the National Party as an assistant labor secretary and that his

¹ The Unemployment Insurance Law uses the term "contributions" to denote the taxes which it levies on employers with respect to wages paid by them. See Labor Law, sec. 570.

duties consisted of studying trends in the labor movement and analyzing proposed labor legislation (R. 200-01).

Petitioners' evidence showed that the petitioners had paid unemployment insurance contributions as contributing employers from the inception of the law in 1936 until their suspension, and that they were currently paying taxes under the Federal Unemployment Tax Act (26 U. S. C. Chap. 23) to the Bureau of Internal Revenue (R. 201). Petitioners further showed that the action of respondent in suspending them as contributing employers had the effect of greatly increasing the aggregate tax payable by each under the interrelated systems of state and federal unemployment insurance taxation. This is so because New York has a so-called "experience rating" scheme which reduces the tax rate of employers who have a record of maintaining employment. See Labor Law, sec. 581.

Under their ratings at the time they were suspended, the National and State Parties, respectively, had been taxed under the state law at the rate of 0.7% and 0.8% of payroll rather than at the maximum rate of 2.7%.² So long as petitioners remained subject to state taxation, they received a credit under the Federal Unemployment Tax Act equal to 2.7% of their payrolls and therefore paid a federal tax at the rate of only 0.3% of payroll. See 26 U. S. C. 3301, 3302(b). Accordingly, their state and federal taxes aggregated 1% of payroll in the case of the National Party and 1.1% in the case of the State Party. The action of respondent in terminating petitioners' liability to state taxation deprived them of the credit provided by 26 U. S. C. 3302(b) and subjected them to federal taxation at the rate of 3% of payroll under 26 U. S. C. 3301.

² The National Party introduced evidence of its rate of taxation (R. 85, 151) and the respondent does not dispute that the State Party was being taxed at a 0.8% rate at the time of its suspension.

Accordingly, as petitioners showed, the action of respondent resulted in tripling their liability for unemployment insurance taxes.³

The referee sustained the determinations of the respondent both in suspending petitioners as contributing employers and in denying Albertson unemployment insurance benefits based on his employment with the National Party. He did so on the ground that sections 2 and 3 of the Communist Control Act declaring that "the Communist Party should be outlawed"⁴ and depriving the petitioners of rights, privileges and immunities, terminated their right to be employers or to have persons in their employment (R. 29-35, 38-42). The Unemployment Insurance Appeal Board affirmed (R. 11-13). The Appellate Division reversed unanimously, holding that the Communist Control Act did not terminate petitioners' status as contributing employers under the state law or affect the right of their employees to unemployment insurance benefits (*infra*, pp. 31-34).

The Court of Appeals, reversing the Appellate Division, reinstated the suspension of petitioners as contributing employers. However, it affirmed the decision of the Appellate Division that Albertson should be credited with his employment by the National Party in determining his unemployment insurance benefits (*infra*, p. 23).

The six judges who participated in the decision handed down three separate opinions, two judges joining in each.⁵

³ On November 21, 1958, while this case was pending in the Appellate Division, the Bureau of Internal Revenue notified each petitioner of an increase in its tax liability under the federal act as a result of the cessation of their contributions under the state act. The Bureau was advised of the pendency of litigation to reverse respondent's ruling, and petitioners have continued to make payment to the Bureau at the 0.3% rate.

⁴ In arguing *Communist Party v. S.A.C.B.*, No. 12, this Term, the Solicitor General stated that this recital has no legal consequences or effect.

⁵ Judge Foster, who was the presiding judge of the Appellate Division when the case was heard and decided there, did not participate.

One opinion construed section 3 of the Communist Control Act as depriving petitioners of the status of employers for "[w]hatever value that status may have" and held that, as so construed, the Act is constitutional. It further held, however, that since Albertson's employment with the National Party ended before the latter was suspended as a contributing employer, "it would be unreasonably punitive" to deny him his insurance. (*Infra*, pp. 19-23) ⁶ Another opinion concurred with the first as to the construction and constitutionality of the Communist Control Act but held that, as so construed, the Act deprived Albertson of the status of an employee and hence of unemployment insurance benefits (*infra*, pp. 29-30). The third opinion construed the Communist Control Act as not affecting the status of petitioners under the state law and accordingly held that they were subject to taxation as employers and that Albertson was entitled to benefits (*infra*, pp. 23-29).

Reasons for Allowing the Writ

This case presents to the Court for the first times questions concerning the construction and constitutionality of section 3 of the Communist Control Act of 1954.⁷ So far as petitioner is aware, section 3 has received judicial consideration in only one other case. See *Salwen v. Reis*, 16 N. J. 216 (1954).

When President Eisenhower signed the Act, he stated that its full impact "will require further careful study" (N. Y. Times, Aug. 26, 1954). Such study has resulted in no action by any agency of the federal government to con-

⁶ The opinion specifically reserved decision as to the status of claimants for benefits whose employment by one of the petitioners post-dated the suspension (*infra*, p. 23).

⁷ Questions as to the constitutionality of section 5 of the Act are before the Court in *Communist Party v. S.A.C.B.*, *supra*, and *Travis v. United States*, No. 3, this Term.

strue or apply the Act's fiat deprivation of petitioners' rights, privileges and immunities.

Thus, as already noted and as Judge Fuld's opinion points out (*infra*, p. 25), the Bureau of Internal Revenue, "admittedly aware of the Industrial Commissioner's position," continues to tax petitioners as employers under the Unemployment Tax Act. Similarly, a referee for the Social Security Administration has held that the National Party is an employer within the meaning of the Social Security Act (42 U. S. C. 410) and that its retired employees are entitled to old age benefits based on wages earned subsequent to enactment of the Communist Control Act. *Matter of Foster, et al.* (R. 165 *et seq.*).

Again, no attempt has been made under section 3 to deny petitioners such federal rights or privileges as the use of the mails, radio and television. Nor has it ever been suggested that section 3 deprives petitioners of any procedural rights. Cf. *Communist Party v. S. A. C. B.*, 351 U. S. 115 and No. 12, this Term.

Thus, New York rushed in where the federal authorities have refrained from treading. In so doing, as the opinion of Judge Fuld points out (*infra*; p. 26), New York has made a breach in the "coordinated and integrated dual system" of federal and state unemployment insurance taxation which Congress intended to establish.

Review by this Court is required for the foregoing reasons and because, as we will show, the court below erred in construing the Communist Control Act and in deciding the important constitutional questions which the case presents.

1. The Court of Appeals erroneously construed and applied section 3 of the Communist Control Act.

A. The obligation to pay unemployment insurance taxes is not a right, privilege or immunity.

Section 3 of the Communist Control Act purports to terminate "whatever rights, privileges, and immunities which have heretofore been granted" to petitioners "by reason of the laws of the United States or any political subdivision thereof." Assuming that New York is a "political subdivision" of the United States (see *infra*, p. 9), its Unemployment Insurance Law does not grant employees any right, privilege or immunity. On the contrary, the law imposes a liability upon them—the liability to pay an unemployment insurance tax. Accordingly, since the Communist Control Act does not purport to terminate petitioners' liabilities, it does not affect their status as taxpayers under the state statute. Two members of the Court of Appeals and an unanimous Appellate Division so held (*infra*, pp. 28, 33).

It is true that so long as petitioners remain liable to the state tax, they realize a substantial tax saving under the inter-related state and federal systems (see *supra*, p. 4). But, contrary to the majority below (*infra*, p. 21), the fact that this tax liability happens to be of value to petitioners cannot transmute the liability into a right.

B. Section 3 does not deprive petitioners of the right to be employers.

The prevailing opinion below (*infra*, p. 21) recognizes that "paying a tax is not really claiming an 'immunity' or 'right.'" The opinion seems to reason, however (*ibid.*), that petitioners' liability for the tax depends upon the existence of their status as employers, and that this status is a "right" which the Communist Control Act extinguished. Thus, the decision below turns upon construing

section 3 of the Act as terminating the right of petitioners to be employers. This construction of section 3 is erroneous.

The prevailing opinion states (*infra*, pp. 21-22):

"The situation in our court is that these Communist Parties are demanding that they be restored to this State's list of employers. They come as unincorporated groups claiming rights or privileges, but all rights of unincorporated associations are created by and dependent upon the State."

Petitioners agree that their right to be employers—i.e., the right to have and to act through employees—is a right granted by state law. For that reason, it is a right which section 3 does not disturb.

Section 3 purports to terminate all rights granted to petitioners "by reason of the laws of the United States or any political subdivision thereof."⁸ This provision does not affect rights which petitioners enjoy by virtue of state law. For the states are not "political subdivisions" of the United States. A subdivision is: "A part of a thing made by subdividing." Webster, *New International Dictionary*. The states, of course, were not "made by subdividing" the nation, but themselves "made" the United States.

Moreover, if Congress had intended section 3 to extinguish rights granted by the states, it would have said so by using the word "state". It did so in the first clause of section 3 which speaks of "the Government of the United States, or the government of any state, territory, district or possession thereof, or the government of any political subdivision therein." As this wording shows,⁸ Congress understood the distinction between a political subdivision and a state, and did not use the former when it meant the latter.

⁸ And see the similar wording of 18 U. S. C. 2385.

The interpretation of section 3 by the majority below is not only contrary to its text but violates the principle that statutes must be narrowly construed so as to avoid questions of constitutionality. *United States v. Rumely*, 345 U. S. 41; *United States v. Witkovich*, 353 U. S. 194; *United States v. Five Gambling Devices*, 346 U. S. 441.

As construed below, section 3 deprives petitioners of the right to employ persons for any purpose whatsoever. But under its granted powers and the Tenth Amendment, Congress may not legislate with respect to rights which are dependent solely on state law. For example, it may not restrict the right of an employer to fix the wages and hours of employees whose employment does not substantially affect interstate commerce. *United States v. Darby*, 312 U. S. 100, 117. Obviously, therefore, it may not extinguish the right to be an employer of such employees.

C. The construction of section 3 by the court below is contrary to that adopted by Congress.

On August 1, 1956, Congress amended the Insurance Contributions Act and the Social Security Act by excluding from taxation and coverage services in the employ of an organization after it has been finally ordered to register as a Communist organization under the Internal Security Act. 26 U. S. C. 3121 (b) (17) and 42 U. S. C. 410 (a) (17). See *Communist Party v. S. A. C. B.*, *supra*. These amendments were evidently inspired by the referee's decision in *Matter of Foster* (R. 164, 166, 189) that the National Party is an employer within the meaning of the Social Security Act and that its retired employees are entitled to old age benefits based on their earnings from employment by it, including employment subsequent to enactment of the Communist Control Act.

If Congress had believed that the *Foster* decision was erroneous in failing to hold, like the majority below, that the Communist Control Act extinguished the right of peti-

tioners to be employers and therefore terminated their liability for employment taxes, it would have rectified the error by an appropriate amendment to the Insurance Contributions Act. Instead, it adopted an amendment, consistent with the *Foster* decision, which does not exclude petitioners from taxation unless and until they are finally ordered to register as Communist organizations.⁹ Accordingly, Congress acquiesced in the *Foster* decision and gave it the force of law. *Copper Queen Mining Co. v. Arizona Board*, 206 U. S. 474; *Muss. Mutual Life Ins. Co. v. United States*, 288 U. S. 269; *Johnson v. Manhattan Ry. Co.*, 289 U. S. 479. It follows that the court below construed the Communist Control Act in a manner contrary to the construction given it by Congress.

2. Section 3 of the Communist Control Act is unconstitutional on its face and as construed and applied.

A. Section 3 violates the due process clause of the Fifth Amendment.

The Court of Appeals held that section 3 "necessarily means that the artificial body or entity calling itself the Communist Party is to be deprived of all the 'rights, privileges, and immunities' that other such entities have," including the right to be an employer. It stated that, "We see no denial of due process in the deprivation of [petitioners] of their status without a hearing," because the recitals of petitioners' alleged misdeeds in section 2 of the Act "are so well established and known that recognition of them without further proof is a right and duty." (*Infra*, pp. 21, 22.)

The holding below contravenes the decisions of this Court.

⁹ Since Congress did not amend the Unemployment Tax Act in a similar manner, it would appear that it intended to continue the liability of petitioners for unemployment taxes even in the event of a final registration order against them.

The right of petitioners to be employers, like the other rights of which section 3 deprives them, are a form of their liberty and property, protected by due process. *West Coast Hotel Co. v. Parrish*, 300 U. S. 379; *Miller v. Wilson*, 236 U. S. 373; *Prudential Insurance Co. v. Check*, 259 U. S. 530.

The Fifth Amendment prohibits Congress from depriving an organization of liberty or property without according it a hearing on the alleged facts which are relied upon to justify the deprivation. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123; *Morgan v. United States*, 304 U. S. 1. If any of the facts required to support the deprivation are found legislatively rather than on the basis of evidence adduced at a hearing, due process has been violated. *Tot v. United States*, 319 U. S. 463; *Manley v. Georgia*, 279 U. S. 1; *McFarland v. American Sugar Refining Co.*, 241 U. S. 79.

On its face and as applied below, section 3 grossly violates this principle. It deprives petitioners of their liberty and property without any hearing whatsoever. Instead, all of the "facts" which are supposed to support the deprivation have been found by Congress in section 2. The denial of due process could not be more flagrant.

Section 3 also violates the principle of substantive due process that legislation must be "reasonably restricted to the evil with which it is said to deal." *Butler v. Michigan*, 352 U. S. 380, 383. The Communist Control Act purports in section 2 to deal with activities of the Communist Party which threaten the national security. But section 3 is not restricted to such activities. On its face and as applied below, the section deprives petitioners of all their rights, including the right to engage, as employers or otherwise, in lawful and peaceable activity which cannot possibly endanger the national security. The effect of the Act and the decision below, therefore, "is to burn the house to roast the pig" (*ibid.*).

B. Section 3 is a bill of attainder.

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial." *Cummings v. Missouri*, 71 U. S. 277, 323.

The Communist Control Act is a bill of attainder in the classical form described in *Cummings, ibid.* It is directed against petitioners by name. Section 2 pronounces them guilty of conspiring to overthrow the government by force and violence and declares that they should be outlawed. Section 3 deprives them of their rights, privileges and immunities.

On its face and as applied, section 3 imposes punishment. The deprivation of rights which it decrees is based solely on alleged past activities of the Communist Party. The deprivation is both absolute and permanent. For the statute permits petitioners no escape from the sanctions of section 3: There is nothing that they can do to restore to themselves the rights which that section denies them. Furthermore, since section 3, as construed below, deprives petitioners of *all* of their rights as artificial entities, it is evident that the statute was not inspired by Congressional concern for any particular activity or status but was aimed at petitioners. These are the indicia of punishment. *Cummings v. Missouri, supra*; *United States v. Lovett*, 328 U. S. 303; *Trop v. Dulles*, 356 U. S. 86; *Flemming v. Nestor*, 363 U. S. 603. Since the punishment is imposed without a trial, judicial or otherwise, section 3 is a bill of attainder.

C. Section 3 is an *ex post facto* law.

"By an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." *Cummings v. Missouri, supra*, at 325-26, quoting Chief Justice Marshall.

As we have shown, section 3 of the Communist Control Act imposes punishment on petitioners for their alleged participation, prior to enactment of the law, in a conspiracy to overthrow the government by force and violence. While such conspiracies were previously punishable by fine and imprisonment (18 U. S. C. 2384), section 3 imposes additional punishment in the form of a deprivation of rights. Moreover, unlike 18 U. S. C. 2384 which requires a judicial trial for conviction and punishment of the offense, section 3 imposes punishment by legislative fiat without evidence or trial. Accordingly, section 3 is an *ex post facto* law as defined above. See *Cummings v. Missouri, supra*, at 325-30.

D. Section 3 is not within the legislative power of Congress.

We have shown that, as construed by the Court of Appeals, section 3 deprives petitioner of rights granted by and dependent solely upon state law and that, so construed, the section is not within the competence of Congress and violates the Tenth Amendment. See *supra*, p. 10.

3. The action of respondent in suspending petitioners as contributing employers denied them due process of law and the equal protection of the laws in violation of the Fourteenth Amendment.

If the judgment below had been rested solely on a construction and application of the Communist Control Act, it would, of course, have presented no question under the Fourteenth Amendment. The prevailing opinion, however, seems at some points to have held that petitioners' status as contributing employers was terminated, not by section 3 of the Communist Control Act, but by the action of respondent in suspending their registrations. Thus, the opinion states (*infra*, p. 22):

"The Appellate Division recognized in its opinion that the State might by appropriate steps prevent

the Communist Parties 'from engaging in any activity or existence.' We think that the State of New York has already done so. The Attorney general, its highest law officer, argues to us on this appeal that the unemployment insurance officers acted validly in denying further recognition to the Communist Parties."

The prevailing opinion's reliance on state action also appears from the holding (*infra*, pp. 22-23) that although Albertson's employment by the National Party postdated the Communist Control Act, he was nevertheless entitled to unemployment benefits because his employment occurred prior to the suspension of the National Party as a contributing employer.

Furthermore, the amended remittitur (*infra*, p. 38) states that the court passed upon the question "whether the action of appellant as Industrial Commissioner in suspending the registrations of the employers-respondents as employers under the Unemployment Insurance Law denied them due process of law or the equal protection of the laws in violation of the Fourteenth Amendment," and held "that the action of the Industrial Commissioner in no way violated or deprived respondents of their constitutional rights." This holding is plainly erroneous and likewise requires review.

As we have seen (*supra*, p. 4), the effect of respondent's action in suspending the petitioners as contributing employers is to triple their liability for unemployment insurance taxes. Yet, this taking of petitioners' property was not authorized by the legislature, and neither respondent nor the Court of Appeals justifies the taking under any state statute. For this reason alone, the action of respondent violates the due process requirement of the Fourteenth Amendment. *Sweezy v. New Hampshire*, 354 U. S. 234, 254-55.

The sole justification advanced by respondent for his action (R. 57) was the opinion of the New York Attorney General (*infra*, p. 42) that "the Communist Party is a conspiracy against the Government of the United States" and therefore should not "be permitted to enjoy the advantages and benefits of this public insurance program." However, many New York employers have not only been suspected or accused but (unlike petitioners) have been convicted of criminal conspiracy and other violations of State or federal criminal laws, including the anti-trust laws, fraud and obscenity statutes, fair rent laws and the like. Yet, neither respondent nor the Attorney General has ever ruled that such convicted employers are excluded from coverage under the Unemployment Insurance Law, and they and their employees continue to enjoy its benefits. It was therefore both discriminatory and arbitrary to single out petitioners for exclusion from coverage. Accordingly, the action of the respondent violated both the due process and equal protection clauses of the Fourteenth Amendment. *Konigsberg v. State Bar*, 354 U. S. 252, 262.

Respondent's action denied petitioners due process for two further reasons. First, the action was taken without proof of or a hearing on petitioners' alleged character as criminal conspirators.¹⁰ Second, even if the premise for respondent's action could be accepted without proof, it would not justify the termination of petitioners' status as employers with respect to employment which is lawful and peaceable. See *supra*, p. 12.

¹⁰ Even if it were assumed, contrary to the decision below (*infra*, p. 22) that petitioners could have introduced evidence to rebut the accusation of the Attorney General, the opportunity to do so would not have satisfied due process. *Speiser v. Randall*, 357 U. S. 513.

CONCLUSION

Certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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Appendix A—Opinions Below**STATE OF NEW YORK****COURT OF APPEALS**

 In the Matter

of

The Claim of WILLIAM ALBERTSON,

Respondent.

ISADOR LUBIN, as Industrial Commissioner,

Appellant.

 In the Matter

of

COMMUNIST PARTY, U. S. A., et al.,

Respondents.

ISADOR LUBIN, as Industrial Commissioner,

Appellant.

 Decided May 26, 1960

Chief Judge Desmond. Two separate but related questions arise in this consolidated proceeding. We are first to decide whether, on the theory that his employment by the Communist Parties (N. Y. and U. S. A.) was not "covered employment", respondent Albertson is ineligible for unemployment insurance benefits. Second, we must determine whether the Industrial Commissioner was legally justified in suspending the registration of the Communist Parties themselves as "employers" within the meaning of the Unemployment Insurance Law.

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We agree with the Appellate Division that Albertson is not to be denied an unemployment insurance award solely because part of his base period of employment was with Communist organizations. Nothing was proven beyond that bare fact. There is no statute or other precedent disqualifying him from coverage. His work with the Communist organizations was not shown to have been criminal, conspiratorial or traitorous. Despite the equivocal status and illegal purposes of his employer, his own contract of hiring (unlike that in *Matter of Clarke v. Town of Russia*, 283 N. Y. 272) was not so completely illegal as to prohibit unemployment insurance coverage. It would be unreasonably punitive to hold that, because the employer who paid unemployment taxes for him was engaged in an anti-American conspiracy, Albertson must lose his insurance. Since the striking of the Parties from the list was as of March 26, 1957, there is no inconsistency in protecting the insurance rights of Albertson whose employment ended before that date.

As to the alleged rights of Communist Parties to recognition and listing, however, we disagree with the Appellate Division. The Industrial Commissioner in performing his statutory duty (Labor Law, § 571) of computing and collecting these taxes had necessarily to decide who were "employers" under the act (*Matter of Electrolux Corp.*, 286 N. Y. 390, 397). In so doing, he could not ignore the Federal Communist Control Act (50 U. S. C. 842) which declared that the Communist Party "is not entitled to any of the rights, privileges and immunity attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever right, privileges and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof are terminated." We take that plain declaration and its absolute language to mean

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what it says, although we find no decisions construing it in this connection. It necessarily means that the artificial body or entity calling itself the Communist Party is to be deprived of all the "rights, privileges, and immunities" that other such entities have. The Appellate Division dealt with this statutory language by saying that the requirement of paying an unemployment insurance tax is not an "immunity or right" where the employer has been allowed by the State to exist, has in fact been allowed the exercise of other privileges and where no reason is shown why it should not pay this tax. Of course, paying a tax is not really claiming an "immunity" or "right" but with the payment of this particular tax goes a status and enrollment as an employer. Whatever value that status may have is being sought and claimed by the Communist Parties in this proceeding.

The State officers of New York, reading literally the Federal statute, have deprived the Communist Parties of their former places on the State's official roll of employers. The Federal Government, although charged with the enforcement of its own Communist Control Act, is, we are told, still collecting unemployment insurance taxes from the Communist Parties. What the reason is for this position we do not know and there is not enough in the record to prove any binding Federal administrative construction of the Federal act. We know that the Communist Parties are allowed to use the mails, list themselves in the telephone books, hold public meetings and write letters to magazines (see Harper's for May, 1960, communication signed by the Party's "National Educational Secretary"). But we are not here determining whether the reports of the demise of these organizations are exaggerated. The situation in our court is that these Communist Parties are demanding that they be restored to this State's list of employers. They come as unincorporated groups claiming

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rights or privileges but all rights of unincorporated associations are created by and dependent upon the State. The Appellate Division recognized in its opinion that the State might by appropriate steps prevent the Communist Parties "from engaging in any activity or existence." We think that the State of New York has already done so. The Attorney-General, its highest law officer, argues to us on this appeal that the unemployment insurance officers acted validly in denying further recognition to the Communist Parties.

We accept none of the arguments that this Federal Communist Control Act is unconstitutional. We do not think that it is a bill of attainder or *ex post facto* legislation. We see no denial of due process in the deprivation of these organizations of their status without a hearing. Section 841 of 50 United States Code contains a Congressional finding that the Communist Party is not really a political party but "in fact an instrumentality of a conspiracy to overthrow the government of the United States", that it is dedicated "to the proposition that the present constitution of the United States ultimately must be brought to ruin by any available means; including a resort to force and violence", and that as an agency of a hostile foreign power it is "a clear, present and continuing danger to the security of the United States." Similar pronouncements are found in a number of decisions of this court and of the United States Supreme Court (see *Dennis v. United States*, 341 U. S. 494, 547; *Matter of Lerner v. Casey*, 2 N. Y. 2d 355, 372, aff'd 357 U. S. 468). These are not mere fiats or rhetorical flourishes but recognitions by courts and Congress of facts that are so well established and known that recognition of them without further proof is a right and duty. (See *East New York Sav. Bank v. Hahn*, 293 N. Y. 622, 627, aff'd 326 U. S. 230).

The administrative determination suspended the registration of the Communist Parties as of March 26, 1957 and the State has not accepted any reports or pay-

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ment of contributions since that date. Since Albertson's employment was earlier than that date there is no difficulty as to him. If there are or will be unemployment insurance problems as to other employees of these Communist Parties, decision on those problems will have to wait until the claims, if any, are presented in the usual way. Many corporations and bodies are considered not to be employers under the Act (see Labor Law, § 560, subd. 4), and presumably their employees are aware of it.

The order of the Appellate Division should be modified by reversing so much thereof as sets aside the suspension of the registration of the employers-respondents and the decision of the Unemployment Insurance Appeal Board in this connection reinstated, otherwise the Appellate Division order should be affirmed, with costs to claimant-respondent against the Industrial Commissioner.

Fuld, J. (dissenting). This is a curious case, a taxpayer, the Communist Party, resists exemption from taxes, while the State, through its Industrial Commissioner, insists on thrusting such an exemption upon it, because of the asserted impact of the Federal Communist Control Act of 1954.

The unemployment insurance system, a joint federal-state undertaking, provides benefits for persons involuntarily unemployed to be financed by an excise tax on employers (see U. S. Code, tit. 26, § 3301 et seq.; N. Y. Labor Law, art. 18). Having lost his job with the Parkside Delicatessen, following earlier employment with the Communist Party, U. S. A., the respondent Albertson applied for such benefits under this State's Unemployment Insurance Law (Labor Law, art. 18).¹ Although the Party had paid to the State all unemployment insurance contri-

¹ His employment with the Communist Party has been treated as essential to qualify him for such benefits.

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butions required to be paid and had for many years made, and is currently making, tax payments to the United States Bureau of Internal Revenue under the Federal Unemployment Tax Act, the Industrial Commissioner decided that it was not subject to the tax and that, on this account alone, Albertson was not entitled to unemployment benefits.

This amazing result is sought to be supported by contentions about the nature of the Communist Party and the Constitutional powers of the Federal and State Governments to deal with it. But, under settled and salutary principles of adjudication, courts avoid decision on such large matters—here, not free of difficulty (see Auerbach, *The Communist Control Act of 1954*, 23 U. of Chi. L. Rev. 173, 183 et seq.; see, also, Remarks of Representative E. Celler, during House debate, 100 Cong. Rec. 14643)—unless they are necessary for a disposition of the issues presented. Here, there is no such necessity; decision of the issues now before us depends solely on the answer to one simple question of statutory construction. Is the Communist Party an “employer” subject to unemployment insurance taxes? If it is, the Appellate Division was correct, and its order reversing the Industrial Commissioner’s determination must be affirmed.

The New York Unemployment Insurance Law, having its origin in the Federal Social Security Act of 1935 (U. S. Code, tit. 42, § 301 et seq.), defines an “employer”, in exceedingly broad terms, as “any persons, partnership, firm, association, public or private . . .” (Labor Law, § 512). Absent an overriding legislative proscription, it is admitted, the Communist Party is an employer within the meaning of our statute, and is liable to pay taxes under the provisions of section 560. But, says the Industrial Commissioner, since 1954, the Federal Government, by enactment of the Communist Control Act (U. S. Code, tit. 50, § 841 et seq.), has prevented the Communist Party from

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being an employer with the consequence that it is not subject to unemployment insurance taxes and its employees are not entitled to any benefits under our Unemployment Insurance Law.

This contention is unreasonable. In the first place, it is significant that the federal authorities, admittedly aware of the Industrial Commissioner's position, have taken one diametrically opposed and continue to recognize the Communist Party as an employer subject to the Federal act. And, although determination of the persons who fall within the class of employers subject to the state tax may not be a matter of federal law, there can be no doubt of the desirability, indeed, of the "obvious necessity of harmonizing where possible our state [unemployment insurance] law with the federal acts." (*Pioneer Potato Co. v. Div. of Employment Security*, 17 N. J. 543, 549, per Brennan, J.) In the second place, the Communist Control Act, relied upon by the Commissioner, may not, in any event, be read to support the determination which he made in this case.

That the Unemployment Insurance Law of New York, as well as of the other states, and the Federal Unemployment Tax Act (U. S. Code, tit. 26, §§ 3301-3308) make up a "coordinated scheme" (*Buckstaff Co. v. McKinley*, 308 U. S. 358, 364) is obvious from the merest perusal of the statutes concerned (see, esp., U. S. Code, tit. 26, §§ 3302, 3306; U. S. Code, tit. 42, § 503; Labor Law, §§ 530, 532, 536, 560, subd. 1, par. [c]²) and has been the subject of judicial observation not only in this court, but in numerous other courts. (See, e.g.; *Matter of Lazarus [Corsi]*, 294 N. Y. 613, 618; *Buckstaff Co. v. McKinley*, 308 U. S. 358, 363-364, *supra*; *Lines v. State of California*, 292 F. 2d 201, 203, cert. den. 355 U. S. 857; *Scripps Mem. Hosp. v. California Empl. Comm.*, 24 Cal. 2d 669, 677; *Arnold College v. Danaher*, 131 Conn. 503, 507; *Stromberg Hatchery v. Ia. Emp. Sec.*

² Paragraph (c) of subdivision 1 of section 560 does not appear in the recodification which took effect in January of 1960.

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Comm., 239 Iowa 1047, 1051; *Pioneer Potato Co. v. Div. of Employment Security*, 17 N. J. 543, 547, *supra*.) Thus, we are told on the highest authority that "it would seem to be a fair presumption that the purpose of Congress was to have the state law as closely coterminous as possible with its own. To the extent that it was not, the hopes for a coordinated and integrated dual system would not materilize." (*Buckstaff Co. v. McKinley*, 308 U. S. 358, 364, *supra*.) Perhaps, the strongest indication that "the administration of the branch of federal security which deals with [unemployment compensation] and the administration of the state laws [dealing with the same subject] constitute a single system" (*Arnold College v. Danaher*, 131 Conn. 503, 507, *supra*), is provided by the fact that our Legislature itself prescribed, as one of the conditions of liability for contributions under our law, that an employer is "liable for tax under the provisions of the federal government tax act" (*Labor Law*, § 560, subd. 1, par. [c].³).

Notwithstanding these overwhelming indications that the state and federal unemployment compensation provisions should be administered, insofar as possible, as one act, the Industrial Commissioner has refused so to consider them. He admits that the federal authorities, despite the statutes on which he relies and despite their awareness of his position, continue to deal with the employer respondents herein as "liable for tax under the provisions of the federal unemployment tax", but he insists that his judgment should not be controlled by their determination. Although he is not under compulsion to do so, the necessity to achieve "a coordinated and integrated dual system" (*Buckstaff Co. v. McKinley*, 308 N. Y. 358, 364, *supra*) represents so strong

³ As noted in footnote 2, this paragraph does not appear in the recent recodification of section 560 which became effective January 1, 1960. It seems to have been omitted for technical considerations and without any regard to underlying policy.

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a state and federal legislative policy that the Industrial Commissioner should have concluded that, as long as an employer is treated by the federal authorities as subject to the federal unemployment tax, it is liable for contributions under our Unemployment Insurance Law, unless, of course, our own statute embodies an express provision to the contrary. (See *Matter of Lazarus [Corsi]*, 294 N. Y. 613, 618, *supra*; see, also, cases cited *supra*; cf. *Matter of Marx v. Bragalini*, 6 N. Y. 2d 322, 333; *Matter of Weiden*, 236 N. Y. 107, 110.) As was said by the Connecticut Supreme Court, "Unless the provisions of the state [unemployment insurance] statute clearly differ from those of the federal act, it must be assumed that the legislature intended that they be interpreted alike, and this is particularly true with reference to those which determine the persons who are obligated to make contributions." (*Arnold College v. Danaher*, 131 Conn. 503, 507, *supra*.)

In short, a determination by the federal authorities that, despite the Federal Communist Control Act, the Communist Party is an employer subject to registration and tax under the Federal Unemployment Tax Act (U. S. Code, tit. 26, § 3301 et seq.) requires a like decision by the Industrial Commissioner. Even were this not so, however, I would, nevertheless, regard the Commissioner's ruling as unreasonable since it rests on a mistaken reading of the Communist Control Act. Insofar as relevant that statute (U. S. Code, tit. 50) recites in section 842:

"The Communist Party of the United States * * * [is] not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party * * * are hereby terminated".

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Whatever else this legislation may mean, it may not be taken to affect the "liability [of] any employer . . . for contributions" under our Unemployment Insurance Law (Labor Law Art. 18, §560). This, it seems obvious, necessarily follows from the fact that, whereas the act cuts off "rights, privileges and immunities", the status of an employer under the Unemployment Insurance Law involves, and is expressly denominated, a "liability" (see, e.g., Labor Law, §§560, 561, 562, 570, 572, 579), the duty to pay an "excise tax." (*Matter of Cassaretakis*, 289 N. Y. 119, 127, affd. 319 U. S. 306; see, also, *Matter of Burke*, 267 App. Div. 127, 130.) Certainly, a deprivation of "immunities" may not be read to confer an immunity from taxation and, just as surely, a loss of "rights" and "privileges" can hardly be said to grant a freedom from the obligation to pay a tax. Taxation is an intensely practical business, and the courts do not deal in riddles in interpreting tax statutes.

There are surely better ways of dealing with the problems posed by communism and the Communist Party than by forced and unreal construction of statutes designed to serve entirely different purposes. The plain fact is that our Unemployment Insurance Law was enacted to benefit the "unemployed worker" (Labor Law, §501), not the employer, and it is the latter who is burdened with a tax in order to fulfill the purposes of the statute. The imposition of such a burden upon the Communist Party as employer cannot possibly be deemed the sort of "right" or "privilege" denied to the Party by the Communist Control Act. If Congress had been intent upon depriving the Communist Party of its ability to enter into contracts or hire employees, it could easily and unmistakably have so provided. And, if our Legislature desired to prevent employees of the Communist Party from receiving unemployment insurance benefits, it could, I assume, have done so,

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but, in the absence of such legislation, the Industrial Commissioner may not bring about this result simply by coining a new legal concept, a privilege new to our law, "the privilege to pay taxes".

This disposes of the proceedings brought by the respondent employer; the Communist Party is subject to registration and taxation as an employer under the Unemployment Insurance Law. And, that being so, it follows that the Appellate Division was also correct in holding, in the proceeding instituted by the respondent Albertson, that he had met all qualifications under the law and was entitled to unemployment benefits.

I would affirm the order appealed from in all respects.

VAN VOORHIS, J. (Concurring in part):

If the Communist Party in the United States is "the agency of a foreign power" and "an instrumentality of a conspiracy to overthrow the government of the United States" as the Congress of the United States has determined (50 U. S. Code, §841), on account of which it has been "outlawed" and declared not to be "entitled to any of the rights, privileges and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof" (id. § 842), then it cannot be recognized as a legitimate employer or its servants as legitimate employees. It has no living legal tissue. It enjoys neither the identity nor the rights, privileges or immunities of a legal organization. Unless these findings by the Congress are idle words, it lacks the power to make contracts and cannot enter into the relationship of employer and employee. No agency of a foreign power or its subsidiary organizations can have a legal status as part of "an authoritarian dictatorship within a republic," as the Communist Control Act says, certainly where its reason for existence is that which is above stated. Taxation does not make it legal (*U. S. v. Yuginovich*, 256

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U. S. 450, 462; *U. S. v. Stafoff*, 260 U. S. 477, 480; *U. S. v. One Ford Coupe*, 272 U. S. 321, 326).

These conclusions are in accord with the majority opinion in so far as it upholds the suspension of the registration of the Communist Party—State and national—but not in regard to the allowance of unemployment insurance to Albertson. In our view the order of the Appellate Division should be reversed in its entirety and the determination of the Unemployment Insurance Appeal Board reinstated.

Judge Dye concurs with Chief Judge Desmond; Judge Fuld dissents in part and votes to affirm the order appealed from in all respects in an opinion in which Judge Fröessel concurs and except Judge Van Voorhis who concurs in part but votes to reverse the order appealed from and to reinstate the determination of the Unemployment Insurance Appeal Board in an opinion in which Judge Burke concurs; Judge Foster taking no part.

Order of the Appellate Division modified in accordance with the opinion herein and, as so modified, affirmed, with costs to claimant-respondent against the industrial Commissioner.

Appendix A—Opinions Below

SUPREME COURT

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

Decision handed down June 17 1959

1251

In the Matter

of

The Claim for Benefits under Article 18 of the Labor Law,
made by WILLIAM ALBERTSON,
Claimant-Appellant,

ISADOR LUBIN, as Industrial Commissioner,
Respondent.

In the Matter

of

The Liability for Unemployment Insurance Contributions
under Article 18 of the Labor Law of Communist Party,
U. S. A. and Communist Party of New York State,
Employers-Appellants,

ISADOR LUBIN, as Industrial Commissioner,
Respondent.

**APPEALS FROM DECISIONS OF THE UNEMPLOYMENT
INSURANCE APPEAL BOARD.**

Claimant-appellant Albertson was employed by the Communist Party, U.S.A., as an assistant labor secretary and testified that his duties were the study of wage trends in the

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labor movement and preparation of analyses of proposed labor legislation. On July 16, 1956, being unemployed, he filed a claim for unemployment insurance benefits, stating that part of the base period to qualify him for benefits was in employment with the Communist Party; and part with other employers. The Industrial Commissioner denied claimant benefits and suspended the registrations of the national and state Communist parties as contributing employers. On Appeal, the Unemployment Insurance Appeal Board affirmed the determinations. The reason for the suspension of the parties is that they constituted a criminal conspiracy and had been outlawed by Congress in the Communist Control Act (68 Stat. 775; 50 U.S.C.A. 841), which enacted (section 3) that the Communist Party is "not entitled to any of the rights, privileges, and immunities attendant upon legal bodies * * * and whatever rights, privileges and immunities which have heretofore been granted * * * are terminated."

The proof is that for twenty years the State Department of Labor had accepted unemployment contributions from the parties (national and state) and the record shows that tax payments under the Federal Unemployment Tax Act are currently being paid by the two Communist parties to the U. S. Bureau of Internal Revenue. No criminal or conspiratorial act is shown in the record as to the claimant's actual work for the Communist Party. The basis of his disqualification is that all the employer's activities are outlawed.

The record demonstrates that the Federal government has not taken any steps to deprive the Communist Party of an ability to perform certain functions of existence, such as renting an office, hiring employees, using the post office or obtaining telephone service in pursuance of the Com-

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munist Control Act of 1954. No doubt the State of New York could take such steps in this direction as it might deem warranted. But having permitted the Communist Party to hire and pay the claimant as an employee and to have and maintain offices and to permit claimant to work in its offices, and to file and pay unemployment insurance taxes, the benefits of such payments should be paid in accordance with law.

Besides this, the claimant himself is not shown on the record to be deprived by any law of the United States or of the State of New York of unemployment insurance benefits. No personal disability arising from any personal criminal activity in which he took part is shown in the record to arise from any statute, nor is it demonstrated he is outlawed or deprived of civil rights.

As far as the employer is concerned the requirement to pay an unemployment insurance tax is not an "immunity and right" within the Federal statute, where the employer has been allowed by the State to exist and has been allowed the exercise of other forms of existence, and we see no reason grounded in law why it should not pay the usual tax.

We do not hold that the State may not prevent the Communist Party from engaging in any activity of existence, such as hiring employees or renting quarters; nor do we hold that if a particular hiring is itself shown to be criminal in the actual employment, that the employee is then entitled to benefits for the period of such employment. But if the State permitted the employer to hire employees, with knowledge derived from the payment of taxes and reports made for many years that such employees were hired and working, there seems no legal ground for not

Appendix A—Opinions Below

applying the tax and granting the benefits as provided by law. This is not based on a principle of estoppel, but is a statutory effect of allowing the employment and taking the tax based on it. If it were demonstrated that a specific employment were criminal as distinguished from a status attaching to the employer itself, a different result might become permissible as to the claim for benefits arising from such an employment, but that is not the showing of the reason.

Decision reversed without costs and claim remitted to the Unemployment Insurance Appeal Board for further proceedings.

Foster, P. J., Bergan, Gibson, Herlihy and Reynolds, JJ., concur.

**Appendix B—Judgment Below and Amendment
Thereeto**

COURT OF APPEALS

Remittitur May 26, 1960

—o—

No. 409

In the Matter of the Claim for Benefits under Article 18
of the Labor Law made by WILLIAM ALBERTSON,
Respondent,

v.

ISADOR LUBIN, as Industrial Commissioner,
Appellant.

—o—
(And another proceeding COMMUNIST PARTY, U. S. A. and
COMMUNIST PARTY OF NEW YORK STATE.)

—o—

BE IT REMEMBERED, That on the 15th day of December in the year of our Lord one thousand nine hundred and fifty-nine, Isador Lubin, as Industrial Commissioner, the appellant—in these causes, came here unto the Court of Appeals, by Louis J. Lefkowitz, Attorney General, and filed in the said Court Notices of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And William Albertson, and Communist Party, U. S. A. and Communist Party of New York State, the respondents in said causes, afterwards appeared in said Court of Appeals by Vladeck & Elias, and John J. Abt, their respective attorneys.

Appendix B—Judgment Below and Amendment Thereto

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, the said Court of Appeals having heard this cause argued by Julius L. Sackman, of counsel for the appellant; and by Mr. Stephen C. Vladeck, of counsel for the claimant-respondent, and by Mr. John J. Abt, of counsel for the employers-respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be, and the same hereby is modified in accordance with the opinion herein and, as so modified, affirmed, with costs to claimant-respondent against the Industrial Commissioner.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Third Judicial Department, there to be proceeded upon according to law.

Wherefore, it is considered that the said order be modified, etc., as aforesaid.

Thereupon, as well the Notices of Appeal and return filed aforesaid as the judgment of the Court of Appeals, and by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Third Judicial Department, and the Justices thereof, according to the form of statute in such case made and provided, to be dealt with according to law, and which record now returned be to the said Appellate Division, and the Justices thereof, etc.

/s/ RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

Appendix B—Judgment Below and Amendment Thereto

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State
of New York, held at Court of
Appeals Hall in the City of Albany
on the eighth day of July A. D.
1960.

Present:

HON. CHARLES S. DESMOND, *Chief Judge*, presiding.

o

Mo. No. 406

In the Matter of the Claim for Benefits under Article 18
of the Labor Law made by WILLIAM ALBERTSON,
Respondent,

ISADOR LUBIN, as Industrial Commissioner,
Appellant.

(And another proceeding—COMMUNIST PARTY, U. S. A.
and COMMUNIST PARTY OF NEW YORK STATE, Employers-
Respondents.)

o

A motion to amend the remittitur in the above cause
having been heretofore made upon the part of the em-
ployers-respondents Communist Party, U. S. A., and Com-
munist Party of New York State herein and papers having
been submitted thereon and due deliberation thereupon
had:

ORDERED, that the said motion be and the same hereby
is granted. Return of the remittitur requested and, when

Appendix B--Judgment Below and Amendment Thereto

returned, it will be amended by adding thereto the following:

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Whether section 3 of the Communist Control Act of 1954 may be construed as terminating the right of the employers-respondents, Communist Party, U. S. A. and Communist Party of New York State, to be "employers" within the meaning of the New York Unemployment Insurance Law; whether, if so construed, section 3 of the Communist Control Act of 1954 is a bill of attainder or ex post facto law forbidden by Article 1, Section 9, Clause 3 of the United States Constitution, or violates the First Amendment or the due process clause of the Fourteenth Amendment * to the United States Constitution, or is beyond the constitutional power of Congress to enact, and whether the action of appellant as Industrial Commissioner in suspending the registrations of the employers-respondents as employers under the Unemployment Insurance Law denied them due process of law or the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. The Court of Appeals held that section 3 of the Communist Control Act of 1954 as construed by it was constitutional, and that the action of the Industrial Commissioner in no way violated or deprived respondents of their constitutional rights.

AND the Appellate Division of the Supreme Court, Third Judicial Department, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

* Thus in the original.

Appendix C—Statutes Involved

The Communist Act of 1954, 68 Stat. 775, 50 U. S. C. 841-44, provides in part as follows:

FINDINGS OF FACT

SEC. 2. The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its members, but from its failure to acknowledge any limitation as to the nature of its activities,

Appendix C—Statutes Involved

and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear, present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed.

PROSCRIBED ORGANIZATIONS

SEC. 3. The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are hereby terminated: *Provided, however,* That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended.

The New York Unemployment Insurance Law, Labor Law, secs. 500 et seq., Consolidated Laws, Chap. 31, Art. 18, provides in part as follows:

Appendix C—Statutes Involved

SEC. 512. Employer.—“Employer” includes the State of New York and any person, partnership, firm, association, public or private, domestic or foreign corporation, the legal representative of a deceased person, or the receiver, trustee or successor of a person, partnership, firm, association, public or private, domestic or foreign corporation.

• • •

SEC. 570. Payment of contributions.—1. Rate. Each employer liable under this article shall pay contributions on all wages paid by him * * *. Contributions shall be paid in an amount equal to two and seven-tenths per centum of such wages, except as otherwise provided by the provisions of sections five hundred seventy-seven and five hundred eighty-one of this article.

**Appendix D—Opinion of the New York
Attorney General**

January 29, 1957

Hon. Isador Lubin
Industrial Commissioner
The Governor Alfred E. Smith
State Office Building
Albany 1, New York

Dear Commissioner Lubin:

Under date of August 22, 1956 you asked the opinion of former Attorney General Javits as to whether employment with the Communist Party of New York State or the Communist Party of the United States may form a basis for determining eligibility to unemployment insurance benefits under the New York State Unemployment Insurance Law; and whether compensation in such employment is subject to the payment of unemployment contributions under that law.

My answer to both questions is in the negative.

The Unemployment Insurance program operates under the auspices of, and is supervised and administered by, the Government of the United States and of this State. It appears to me implicit that the character and activities of the Communist Party foreclose it and its employees from the rights and privileges of participation in that program.

The nature of the Communist Party, its activities and objectives, have been characterized by the Congress of the United States in the Internal Security Act of 1950 and the Communist Control Act of 1954. To quote from the findings and declarations of fact in Section 2 of the latter Act (50 U. S. C. A., § 841):

"The Congress finds and declares that the Communist Party of the United States, although pur-

Appendix D—Opinion of the New York Attorney General

portedly a political body, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States."

The section concludes:

" . . . the Communist Party should be outlawed."

Section 3 of the same Act (50 U. S. C. A., § 842) provides that the Communist Party, its successors, and subsidiary organizations

"are not entitled to any of the rights, privileges and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated."

I draw your attention also to the "Congressional Findings of Necessity" in the Internal Security Act of 1950 (Section 2; 50 U. S. C. A., § 781).

In this State, the Legislature has, in the Feinberg Law (L. 1941, ch. 360, § 1) and in the Security Risk Law (L. 1951, ch. 233, § 1; Unconsolidated Laws, p. 1101), made findings of similar import in respect to the Communist Party.

The Court of Appeals of this State has written of the nature of the Communist Party (*Matter of Daniman v. Bd. of Education of the City of New York*, 306 N. Y. 532, 540):

"In this court we are all agreed that the Communist Party is a continuing conspiracy against our Government. (See *Communications Assn. v. Douds*, 339 U. S. 382, 425 et seq.; *Dennis v. United States*, 341 U. S. 494, 564; Preamble to the Feinberg Law (L. 1949, ch. 360, § 1.)"

Appendix D—Opinion of the New York Attorney General

The Supreme Court of the United States has voiced like opinions (*Dennis v. United States*, 341 U. S. 499; *American Communications Assn. v. Douds*, 339 U. S. 382) and held members of the Communist Party subject to being proscribed from rights and privileges such as that of being a teacher in the public schools of this State (*Adler v. Bd. of Education*, 342 U. S. 485).

The Subversive Activities Control Act, to which I have already referred, was upheld as constitutional by the United States Court of Appeals for the District of Columbia Circuit, which held that the Communist Party of the United States was required to register thereunder as a Communist-action organization (*Communist Party of U. S. v. Subversive Securities Control Board*, 223 F. (2d) 531). The Court said at one point:

“ * * * we perceive no reason why the presently existing government in this country should not * * * withdraw from its (Communist organization's) members protection and privileges otherwise afforded by that government.”

As to the nature of the Communist Party in this country, see some of the observations of Circuit Judge Prettyman in the course of this opinion, for example, pages 565 to 576. The Supreme Court of the United States, on appeal thereto, remanded the case to the Board without reaching the question of constitutionality, because the testimony of three witnesses before the Board was contended to be possibly perjurious (351 U. S. 115).

The Communist Party has thus been declared by the highest Court of this State; by the Supreme Court of the United States, by the Congress of the United States, and by the Legislature of this State, to be a conspiracy against the government of the United States and of this State, and as an organization, and as to members thereof, not entitled

Appndix D—Opinion of the New York Attorney General

to protections and privileges otherwise offered by government.

Returning then to the question here before us, I find that your department in the past, in administering the Unemployment Insurance Law, and the Courts, in another area of social insurance, Workmen's Compensation, have denied these rights in the case of employees of employers engaged in enterprises which are illegal, or declared by the Legislature to be against public policy. You have enclosed in your letter two determinations (one in 1951 and one in 1952) by your department to such effect. One of these decisions quotes from an earlier one as follows:

"The Unemployment Insurance Law does not confer benefits upon an employee in a business which has been declared by the legislature to be against public policy and the conduct of which involves a violation of the criminal law."

In a case arising out of a Workmen's Compensation claim for injury resulting in death to a bartender employed in a saloon when prohibition was in effect, the Appellate Division (3rd Dept.) dismissing the claim, declared:

"This Court will not lend its aid to the enforcement of any claim growing out of a contract of employment one of the purposes of which is the violation of a law of the land * * *".

For a like result, see also *Swihura v. Horowitz*, 215 App. Div. 740, aff'd 242 N. Y. 523.

It is my opinion that in light of the repeatedly declared views by the Courts and by the federal and this State's legislative bodies, that the Communist Party is a conspiracy against the Government of the United States and of this State, it would be an anomaly in law, not to say

Appendix D—Opinion of the New York Attorney General

amoral and against public policy, for the Communist Party and its employees to be permitted to enjoy the advantages and benefits of this public insurance program. To make such exclusion is, as I have set forth *supra*, matter of precedent. In so far as *scienter* on the part of the employee is concerned, it is certainly a fair inference that anyone now claiming benefits based on employment by the Communist Party during the past year (the base year for one now making unemployment insurance claims) had full knowledge of the nature, activities and objectives of the Communist Party.

I conclude, accordingly, that unemployment insurance contributions should not be received, pursuant to the New York State Unemployment Insurance Law, from the Communist Party of New York State or the Communist Party of the United States, and that employment by the Communist Party of New York State or the Communist Party of the United States should not be credited as a basis for determining unemployment insurance benefits under the statute by ruling of your department. The ultimate decision, of course, is in the courts, to which one considering himself aggrieved by your determination would have recourse.

Very truly yours,

LOUIS J. LEFKOWITZ,
Attorney General.

FILE COPY

Office-Supreme Court, U.S.

FILED

NOV 18 1960

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

No. 495—October Term, 1960

COMMUNIST PARTY, U. S. A., and COMMUNIST
PARTY OF NEW YORK STATE,

Petitioners,

vs.

ISADOR LUBIN, as Industrial Commissioner,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

LOUIS J. LEFKOWITZ,

Attorney General of the State
of New York

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Albany 1, New York

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IN THE
Supreme Court of the United States

No. 495—October Term, 1960

**COMMUNIST PARTY, U. S. A., and COMMUNIST
PARTY OF NEW YORK STATE,**
Petitioners,

vs.

ISADOR LUBIN, as Industrial Commissioner,
Respondent.

**BRIEF IN OPPOSITION TO PETITION
FOR CERTIORARI**

Opinions Below

Based upon an official opinion of the Attorney General of the State of New York (Appendix D to Petition, pp. 42-46), the respondent suspended the registrations of the Communist Party, U. S. A. (R. 48-49)* and the Communist Party of New York State (R. 51-52) as employers under the New York State Unemployment Insurance Law (Labor Law, §§ 500 *et seq.*, Consolidated Laws, Chap. 31, Art. 18).†

* References are to pages of Record on Appeal to the Court of Appeals.

† Suspension of registration as an employer results in the exclusion of the employer from the operation of the Unemployment Insurance Law so that it is thereby deprived of the opportunity of affording to its employees the benefits of that law. It is thus gravely handicapped in securing employees.

This determination of the respondent was sustained by the Unemployment Insurance Referee (R. 19-43) and the latter's decision was affirmed by the Unemployment Insurance Appeal Board (R. 11-13).

The Appellate Division of the New York Supreme Court reversed the decision of the Appeal Board and overruled the respondent's suspension of the petitioners' registrations as contributing employers. Its opinion is reported in 8 A. D. 2d 918 (R. 200-203).*

The Court of Appeals of the State of New York reversed the decision of the Appellate Division and reinstated the respondent's determination suspending the registration of the petitioners as employers. Its opinion (DESMOND, C. J.) is reported in 8 N. Y. 2d 77. Judge FULD wrote a dissenting opinion; Judge VAN VOORHIS wrote a concurring opinion.†

Jurisdiction

The grounds on which the jurisdiction of the Court is invoked are set forth in the Petition (p. 2).

Questions Presented

The questions presented are as set forth in the Petition (p. 2).

Constitution, Statutes, Reports, Etc., Involved

Involved in this application are:

U. S. CONSTITUTION:

Preamble, Art. I, § 4, Art. I § 8 Cl. 1, Art. II § 1,
Amendments I, V, X and XIV.

* See Appendix A to Petition, pp. 31-34.

† For all of the opinions see Appendix A to Petition, pp. 19-30.

STATUTES:

Federal

Communist Control Act of 1954 (50 U. S. Code §§ 841 *et seq.*, 68 Stat. 775)*

Subversive Activities Control Act of 1950 (50 U. S. Code § 781, 64 Stat. 987)*

State

Feinberg Law (L. 1949, ch. 360, § 1)*

Labor Law, §§ 511, 571.

OTHER DOCUMENTS:

Congressional Record (August 16, 1954, p. 13837; August 17, 1954, pp. 14079, 14081, 14082, 14088)

Report of U. S. House of Representatives dated August 22, 1950 (House Rep. No. 2980, U. S. Code Cong. and Admin. News, 1950, p. 3886)*

Attorney General's Opinion

1957 Op. N. Y. Atty. Gen. 239†

Statement

The respondent suspended the petitioners' registrations as employers under the New York Unemployment Insurance Law. Upon the administrative review of this determination the respondent justified his ruling under the provisions of the Communist Control Act of 1954. In establishing a *prima facie* case in the review proceeding, to support his determination, the respondent relied on the doctrine of judicial notice and judicial regard for legislative findings as to the character of the Communist Party as a criminal conspiracy for the overthrow of the Government by force and violence. The petitioners were free to submit such

* See Appendix, *infra*, pp. 22-32.

† See Appendix D to Petition, pp. 42-46.

evidence as they saw fit to controvert this fact, but failed to avail themselves of the opportunity.

Reasons for Denying Petition for Certiorari

Although it cannot be denied that a Federal and constitutional question is present in this case, the question is one that is merely formal in character, having no substantiality whatsoever, since prior decisions of this Court leave no room for real controversy with respect to any of the points raised by the petitioner. This case does not meet the standard set up by this Court in its Rule 19(1)(a). (See also *Equitable Life Assurance Society v. Brown*, 187 U. S. 308, 310-311, 314-315 [1902]; *Zucht v. King*, 260 U. S. 174 [1922]; *Palmer Oil Corp. v. Amerada Corp.*, 343 U. S. 390 [1952]).

Summary of Argument

The Industrial Commissioner, possessed of the power to suspend the petitioners as employers under New York's Unemployment Insurance Law,* properly exercised that power by reason of the facts:

(a) That each of the petitioners constitute a criminal conspiracy, the principal object of which is the overthrow of the Government of the United States by force and violence, and that judicial notice could be taken of that fact;

(b) That any rights, privileges and immunities which the petitioners may have had, including the

* In the performance of his statutory duty to determine the amount of contributions, (i.e., taxes) due from an employer (Labor Law § 571), the Industrial Commissioner has been held to have the power to determine who is an employer within the meaning of the statute (*Matter of Electrolux Corp.*, 286 N. Y. 390, 397 [1941]).

right to be classified as an employer within the meaning of the Unemployment Insurance Law, were terminated by the Communist Control Act of 1954.

Congress had the constitutional power to enact the Communist Control Act and its findings are entitled to great weight. The Act unquestionably affects rights, privileges and immunities granted or created under State Law. It deals not only with such "rights, privileges and immunities," but also with the obligations or duties which are correlative thereto.

Federal inaction under the Act does not impugn its viability nor militate against its legal efficacy.

Although the petitioners, in any event, have no standing to assert any objections to the Act on constitutional grounds, it may nevertheless be clearly demonstrated that the Act is constitutional. Since neither punishment nor retroactivity is involved, it does not constitute either a bill of attainder or an *ex post facto* law. The Act does not violate either substantive or procedural due process, although, if it did, that would not be fatal. Denial is justified under a basic postulate of due process—movements seeking to crush freedom need not be tolerated. There can be no judicial interference with a reasonable legislative judgment of what laws are essential to national security. Nor does the First Amendment serve to invalidate the Act, since the freedoms it guarantees are not absolute but may be restricted to protect other vital interests of the Government which are clearly necessary to the effectuation of proper Congressional power. The Tenth Amendment, too, has no bearing upon this exercise of Congressional power, because Congress acted well within its jurisdiction under the constitutional provisions for the "common defense" and the guaranty to every State of a republican form of government.

ARGUMENT

POINT I

The petitioners do not possess the legal capacity to enjoy any of the rights, privileges and immunities of a legal enterprise.

A. Judicial notice.

None of the parties adduced any evidence whatever, either at the hearings before the Referee or at the hearing before the Appeal Board, as to the character or capacity of the petitioners. Having failed to submit any evidence, as was their right, to controvert the fact that they were a criminal conspiracy, the petitioners are deemed to have waived any objections that they might otherwise have asserted to a determination based upon such premise.

The Commissioner, on the other hand, is in an entirely different position. It was not incumbent upon him affirmatively to adduce evidence on that issue. He could rely completely upon the fact that judicial notice would be taken at all stages of the proceeding of the fact that the petitioners constituted a criminal conspiracy. (*Barenblatt v. United States*, 360 U. S. 109, 127-129 [1959]; *Dennis v. United States*, 341 U. S. 494, 547 [1950]; *American Communications Association, C. I. O. v. Douds*, 339 U. S. 382, 424-433 [1950; concurring opinion of Mr. Justice JACKSON]; *Martinez v. Neelly*, 197 F. 2d 462, 465 [7th Cir., 1952], *affd.* 344 U. S. 916 [1953]; *Carlson v. Landon*, 187 F. 2d 991, 997 [9th Cir., 1951], *affd.* 342 U. S. 524 [1952]; *National Maritime Union of America v. Herzog*, 78 F. Supp. 146, 170 [Dist. of Col., 1948], *aff'd.* 334 U. S. 854 [1948]; *In re McKay*, 71 F. Supp. 397, 399 [N. D. Ind., 1947]; *Matter of Lerner v. Casey*, 2 N. Y. 2d 355, 372 [1957], *affd.* 357 U. S.

468 [1958]; *Appeal of Albert*, 372 Pa. St. 13, 19-22, 92 A. 2d 663 [1952]; *Pawell v. Unemployment Compensation Board of Review*, 146 Pa. Super. 147, 150-151, 22 A. 2d 43 [1941]).

The petitioners have failed to distinguish between the crime itself and the perpetrator of the crime.* The Courts need no evidence to substantiate the fact that certain acts, by definition, constitute a crime. Thus, the Communist Party, U. S. A., and its subordinates and affiliates on other geographical levels, *in and of themselves* constitute a criminal conspiracy, and no evidence of such fact needs to be adduced. They are a crime, just as burglary and arson, murder and treason are crimes. We are not dealing here with any particular individual who, as a member of the Party, or otherwise, commits "communism".

B. Legislative findings.

Closely akin to the establishment of the character and nature of the Communist Party under the doctrine of judicial notice is the fact that great weight must be accorded

* It is conceded that in denaturalization proceedings (*Nowak v. United States*, 356 U. S. 660 [1958]), disciplinary proceedings against a member of the Civil Service (*Adler v. Board of Education*, 342 U. S. 485 [1952]), proceedings to determine whether an individual possesses the requisite character to merit admission to the bar (*Schware v. Board of Bar Examiners*, 353 U. S. 232 [1957]), criminal proceedings against an individual (*Yates v. United States*, 354 U. S. 298 [1957]), or any other case in which it is sought to establish that an individual is guilty of criminal advocacy of overthrow of the government by force and violence, it is necessary that such fact must be affirmatively established by evidence other than that which may be considered under the doctrine of judicial notice. However, these cases are authority simply for the proposition that the doctrine of judicial notice of the character of the Party cannot be employed as a substitute for evidence in any case involving the requirement of proof that a particular member of the Party participated in any illegal activity as a member.

to the legislative findings of Congress and of the legislatures of New York and other states with respect to the character and nature of the Communist Party. (See Subversive Activities Control Act of 1950, 50 U. S. Code § 781, 64 Stat. 987, Appendix, *infra*, pp. 22-25; Communist Control Act of 1954, 50 U. S. Code § 841, 68 Stat. 775, Appendix, *infra*, pp. 26-29; Feinberg Law, N. Y. L. 1949, ch. 360, § 1, Appendix, *infra*, pp. 29-30; Report of U. S. House of Representatives dated August 22, 1950 [House Report No. 2980], U. S. Code Cong. and Admin. News 1950, p. 3886, Appendix, *infra*, pp. 30-32).*

C. Their inherent illegality renders them incompetent to exercise any rights, privileges and immunities.

It is apparent from the foregoing that in the absence of evidence to controvert the fact, as is the situation in the case at bar, both the doctrine of judicial notice and the rule that legislative findings must be accorded great weight, establish the fact that the petitioners herein constitute a criminal conspiracy to overthrow the Government of the United States and the Government of the State by force and violence. As such, they are illegal organizations whose illegality permeates every facet of their operations. The illegality is based on the concept of being both constitutionally and morally wrong. In other words, it is *malum in se*. They are constitutionally incapable of an innocent or legal act (*Sprott v. United States*, 20 Wall. 459, 464-465 [1874]).

* See also: *Galvan v. Press*, 347 U. S. 522, 529 (1953); *American Communications Association, C. I. O. v. Douds*, 339 U. S. 382, 391 (1950); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937); *Block v. Hirsch*, 256 U. S. 135, 154 (1921); *Communist Party of U. S. v. Subversive Activities Control Board*, 223 F. 2d 531, 565-566 (App. D. C., 1954), revd. and remanded on another ground, 351 U. S. 115 (1956).

POINT II

Assuming, arguendo, pre-existing legal capacity on their part, nevertheless the petitioners' rights, privileges and immunities were terminated by the Communist Control Act.

Both of the petitioners are proscribed under Section 3 of the Act (50 U. S. Code § 842, Appendix *infra*, p. 27)—the Communist Party of the United States by name, the Communist Party of New York State as one of the latter's "subsidiary organizations". Furthermore, Section 4(b) of the Act (50 U. S. Code § 843 [b], Appendix, *infra*, p. 28), which is *in pari materia* with Section 3, defines the term "Communist Party" as "the organization now known as the Communist Party of the United States of America, the Communist Party of any State or subdivision thereof, and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name thereof."

The petitioners distinguish between the phrase at the beginning of Section 3; "the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein," (Appendix *infra*, p. 27) and the two phrases at the end of the section dealing with non-entitlement to any rights, privileges, and immunities of bodies created under the jurisdiction "of the laws of the United States or any political subdivision thereof", and termination of rights granted by reason "of the laws of the United States or any political subdivision thereof." The petitioners assert that the wording of the latter two clauses demonstrates Congressional recognition of the distinction between "a political subdivision" and a "State". Petitioners state that a subdivision is "a part of a thing made

by subdividing" and that "the states, of course, were not 'made by subdividing' the nation, but themselves 'made' the United States" (petitioner's brief, p. 9). In other words, as they argued in the Court below, the phrase "political subdivision", as used in the last clause of the section, is a short-hand reference to the federal territories and possessions and the District of Columbia, all of which are "political subdivisions" of the United States.

In the first place it must be observed that even in the absence of other factors which would aid in the process of statutory interpretation, the mere absence of the word "State" in a federal statute does not exclude applicability of the statute to the States (*Case v. Bowles*, 327 U. S. 92, 99 [1946]).

Secondly, it was quite clearly the intent of Congress to include in the last two phrases, in short-hand form, the same political entities as were included in detail in the first phrase. This is apparent from the context of the latter two phrases, in which the political entities referred to are entities having law-making powers. Certainly, the District of Columbia and many of the federal possessions do not have independent or sovereign law-making powers under which corporations may be formed and under which statutory rights, privileges and immunities may arise. Laws for the District and such possessions are enacted directly by Congress. A State, on the other hand, has independent, sovereign law-making powers in the respects stated.

Moreover, the petitioners' analysis, confining the meaning of "political subdivision" in the last clause to the District and federal possessions, is illogical because these, too, were specifically referred to in the first clause. The more logical conclusion would seem to be that in the first clause the words "political subdivision" refer to *local*

governmental units within the States and Territories, while the same words, as used in the last clause, which actually terminates the rights of the Communist Party, include the States.*

According to the argument of the petitioners the Communist Control Act does apply to Alaska and Hawaii because at the time of its enactment they were territories of the United States. Do the petitioners now claim that since these territories have attained statehood the Act no longer applies to them? And if it is admitted that the Act continues to apply to them, what happens to the principle that all States are admitted to the Union upon an equal footing?

It seems obvious, also, from the context of the section, as a whole, that the *laws*, the benefit of which the petitioners have lost, are necessarily the laws of the *governments*, federal, state and territorial which the petitioners seek to overthrow. The fine splitting of hairs, the reliance upon whether the Nation was "made" from the States or vice versa, cannot obscure the intent so clearly expressed in the statute.

* This interpretation is, furthermore, in accord with the congressional intent, as the intent is reflected in the legislative record (100 Cong. Rec. 14079, 14081 [daily ed. August 17, 1954]; *id.*, at 13837 [daily ed. August 16, 1954]; *id.*, at 14082 [daily ed. August 17, 1954]). In the cited pages of the Congressional Record it was stated that the Act would deny the Party a place on the ballot. Since the right to appear on the ballot, whether for State or Federal office, depends on State law (U. S. Const., Art. I, § 4 and Art. II, § 1; *United States v. Gradwell*, 243 U. S. 476 [1917]; 18 AM. JUR., tit. Elections § 9 [1938]), it must necessarily have been the intention of Congress that state-granted rights be included within the proscription of section 3 of the Act.

A. The Communist Control Act deals with "rights, privileges and immunities"; necessarily, it also deals with "obligations or duties" which are correlative to the "rights, privileges and immunities".

The Industrial Commissioner argues, and he has been upheld by the Court below, that whatever rights, privileges and immunities the petitioners may have had were terminated by the Communist Control Act. The dissenting opinion of FULD, J., in the Court below held, and the petitioners here urge, that the requirement to pay an unemployment insurance tax is a liability imposed upon them and not an "immunity or right" within the Act. Of course, in the very nature of the matter an *obligation or duty* to pay a tax cannot be considered a *right, privilege or immunity*. The relevant point involved herein is whether the *right to be a registered employer* was terminated by the Act. The correlative of the right to be an employer in covered employment is the obligation to pay the tax, but the latter is merely the tail which should not be permitted to wag the dog. As well might it be argued that the obligation to pay an income tax is determinative of the right to earn income, or to push the analogy to an even greater extreme, the obligation to pay an estate tax is determinative of the right to pass title by will or descent. (Cf. *Rutkin v. United States*, 343 U. S. 130, 137 [1951]; *Wainer v. United States*, 299 U. S. 92, 93 [1936]; *Angelus Building & Investment Co. v. Commissioner of Internal Revenue*, 57 F. 2d 130, 132 [9th Cir., 1932], cert. den. 286 U. S. 562; *State ex rel. Replogle v. Joyland Club*, 124 Mont. 122, 220 P. 2d 988, 999 [1950]; *State v. Israel*, 124 Mont. 152, 220 P. 2d 1003, 1011 [1950]; *Commonwealth ex rel. Gilmer v. Smith*, 193 Va. 1, 68 S. E. 2d 132, 136 [1951]; *Stein v. State Tax Comm.*, 266 Ky. 770, 115 S. W. 2d 443, 445 [1936]; *Lueke v. Mescall*, 272 Ky. 770, 115 S. W. 2d 358 [1938]).

It seems obvious that the essential test determining taxability is the prerequisite of coverage of the employer under the Unemployment Insurance Law; coverage cannot arise simply upon the basis of payment of the tax. It follows that although the Act does not affirmatively relieve the petitioners of a tax liability, it destroys a status upon which the tax liability depends.

POINT III

The Communist Control Act is constitutional.

A. Congress had the constitutional power to enact the Communist Control Act.

The Communist Control Act is founded on a much broader, much firmer, and more relevant base than control of interstate commerce. The Federal Government, through Congress, has a constitutional right to act, not only in its own behalf, but also in behalf of the several States. Congress has the power to provide for the common defense (Const., Art. I, Sec. 8, Cl. 1; see also, the Preamble to the Constitution) and is under the duty to implement the guarantee to every State of a republican form of government. (*Dunne v. United States*, 138 F. 2d 137, 140 [8th Cir., 1943], cert. den. 320 U. S. 790 [1943]; *Farmer v. Rountree*, 149 F. Supp. 327, 329 [M. D. Tenn., 1956], affd. 252 F. 2d 490, 491 [6th Cir., 1958], cert. den. 357 U. S. 906 [1958]; *United States v. Peace Information Center*, 97 F. Supp. 255, 261 [Dist. of Col., 1951]; *Oil Workers International Union v. Elliott*, 73 F. Supp. 942, 944 [N. D. Texas, 1947]; *Teget v. Lambach*, 226 Iowa 1346, 1350, 286 N. W. 522 [1939]; *Commonwealth v. Nelson*, 377 Pa. St. 58, 69, 104 A. 2d 133 [1954], affd. 350 U. S. 497 [1956]).

Aside from the question of constitutional capacity to enact a law such as that involved herein, it should be noted that the right so to act is without constitutional limitation, is considered political in nature, and is not judicially reviewable (*Ohio v. Akron Park District*, 281 U. S. 74, 79-80 [1930]; *Highland Farms Dairy v. Agnew*, 300 U. S. 608, 612 [1937]; *Farmer v. Rountree*, *supra*).

The Tenth Amendment (reserved power of the States) does not impose any limitations on the powers of the Federal Government (*Case v. Bowles*, 327 U. S. 92, 101-102 [1946]; *Fernandez v. Wiener*, 326 U. S. 340, 362 [1945]; *United States v. Darby*, 312 U. S. 100, 123-124 [1941]). It merely gives doctrinal body to an objection that Congress has no power to act at all in certain areas. It "states but a truism that all is retained which has not been surrendered" (*United States v. Darby*, *supra*). Thus, if Congress has power to act in a given area, no valid objection can be raised because of the fact that it thereby enters a field which ordinarily has been regulated by the States (*Case v. Bowles*, *supra*; *Bowles v. Willingham*, 321 U. S. 503, 521-523 [1944, concurring opinion of Mr. Justice RUTLEDGE]; *United States v. Darby*, *supra*, at pp. 114, 123-124; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 156 [1919]).

B. The Act does not constitute a bill of attainder or an *ex post facto* law.

A bill of attainder is generally described as a legislative act which imposes punishment upon a named individual or an easily ascertainable group without a judicial trial (*United States v. Lovett*, 328 U. S. 303, 315 [1946]; *Cummings v. Missouri*, 4 Wall. 277, 323 [1867]). The *ex post facto* provision of the Constitution forbids *penal* legislation which imposes or increases *criminal punishment* for conduct law-

ful previous to its enactment, but does not apply to legislation imposing civil disabilities (*Harisiades v. Shaughnessy*, 342 U. S. 580 [1952]).*

The deprivations provided for in the Act do not constitute punishment since the legislation does not evince a penal intent. True it is that the statute imposes certain civil disabilities, but not all imposition of disability constitutes punishment. This Court recently held that whether a statute is a bill of attainder depends upon the purpose of the statute. (*Trop v. Dulles*, 356 U. S. 86, 96 [1958]. See also *Flemming v. Nestor*, 363 U. S. 603, 613-616 [1960] and *DeVeau v. Braisted*, 363 U. S. 144, 160 [1960]). It is quite clear from the "Findings and Declarations of Fact" which are expressly set forth in the Act (50 U. S. Code § 841, 68 Stat. 775), that the purpose of Congress in enacting this legislation was to draw the fangs of this "agency of a hostile foreign power" whose existence was "a clear and present danger to the security of the United States."

Furthermore, assuming, *arguendo*, that the disqualification was based on the legislature's implicit determination of culpability, recent cases require that the proscription have retroactive application in order to constitute punishment. (See *Garner v. Board of Public Works*, 341 U. S. 716 [1951]; *American Communications Association, C. I. O. v. Douds*, 339 U. S. 382, 413-414 [1950]; *Albertson v. Millard*, 106 F. Supp. 635 [E. D. Mich., 1952], *revd.* on another ground and remanded 345 U. S. 242 [1952]; *Huntamer v. Coe*, 40 Wash. 2d 767, 246 P. 2d 489 [1952].)

* The debates in the federal convention upon the Constitution show that the term "*ex post facto* laws" was understood in a restricted sense relating to criminal cases only (*Hugajewitz v. Adams*, 228 U. S. 585 [1913]; see also, *Carpenter v. Pennsylvania*, 17 How. 463 [1855] and *Johannessen v. United States*, 225 U. S. 227 [1912]).

In the case at bar, too, a like result should ensue. The Act does not inflict punishment of any character, and if it be held that punishment is inflicted, it is clear that it is not imposed by reason of any past conduct. Recognizing the *continuing* criminal character of the Party, the Act provides for inability to assert in the future any rights, privileges and immunities in connection with transactions which take place subsequent to the effective date of the Act.

C. The Act does not violate the due process clause of the Fifth Amendment.

Despite the proscription set forth in the Act, there is nothing in the Act which deprives the Party of substantive due process when action is brought against it to terminate a right which it claims. It is precisely that which is taking place in the case at bar. The petitioners were afforded the opportunity at the hearings herein to present evidence in opposition to the termination of their rights. Neither the Industrial Commissioner, nor the Referee, nor the Appeal Board denied them the right to present their case. And the statute, itself, does not deny them that right.

So far as procedural due process is concerned, they received notice of the action of the Commissioner and they received notice of all proceedings to review the action of the Commissioner. They also had a full hearing.

It is submitted that there has been no violation of due process, either substantive* or procedural. It is further

* Petitioners assert (page 12 of their brief) that Section 3 is not "reasonably restricted to the evil with which it is said to deal" (citing *Butler v. Michigan*, 352 U. S. 380, 383 [1956]). But the evil at which the Act strikes is identical with the evil at which Congress struck in the Internal Security Act of 1950. We respectfully refer the Court to the treatment of this point in the respondent's brief in this Court in *Communist Party of the United States of America v. Subversive Activities Control Board*, October Term, 1960, No. 12, pp. 93-100.

submitted, however, assuming it be held that the statute does permit a denial of due process, that such denial would be proper, as consonant with a basic postulate which underlies the due process provision—movements seeking to crush freedom need not be tolerated. Mr. Chief Justice HUGHES, in *Principality of Monaco v. Mississippi*, 292 U. S. 313, 322 (1934), expressed the admonition that behind “the words of the constitutional provisions are postulates which limit and control.”

The Courts, generally, have refused so to construe the Bill of Rights as to interfere with a reasonable legislative judgment of what laws are essential to national security. This is as it should be, for without the observance of the primary duty of self-preservation the civil liberties of the individual would be meaningless, since they must, under such circumstances, succumb to the totalitarian regime which must inevitably follow.

It is submitted that the Constitution should be construed in accordance with its purpose and *as one instrument*. Pre-occupation with or emphasis upon one part of the Constitution and the ignoring of another equally important part, so as to endanger national survival, constitutes an unrealistic and an improper method of applying constitutional standards and principles.

The greatest difficulty in recent years has been with respect to the situation where the right to assert infringement of civil liberties and the right of the government to resist violence seem to meet. There is required a deeper analysis of violence and non-violence and their relation to liberal democracy. In the *Dennis and Yates* cases, *supra*, this Court affirmed “the basic premise of our political system—that change is to be brought about by non-violent constitutional process.” No government can assure a

"right" of violent overthrow; the guaranty and the right are mutually abhorrent. Certain political philosophers to the contrary notwithstanding, violent revolution exists *outside* rather than *inside* the law. Therefore, since the Communist Party is a conspiracy for the violent overthrow of the government, its advocacy of such violence colors its every act and withdraws it from the protection of the Bill of Rights.

D. The Act does not violate the First Amendment.*

The basic postulate, discussed above with respect to due process, is a limiting factor also upon the operation of the First Amendment (*Communist Party of United States v. Subversive Activities Control Board*, 223 F. 2d 531, 544 [App. D. C., 1954], *revd.* and *remanded* on another ground 351 U. S. 115 [1956]).

This Court has consistently held that the freedoms guaranteed by the First Amendment are not without limitation (*Debs v. United States*, 249 U. S. 211 [1919]; *Frohwerk v. United States*, 249 U. S. 204 [1919]; *Schenck v. United States*, 249 U. S. 47, 52 [1919]; *Schaefer v. United States*, 251 U. S. 466 [1920]; *Dennis v. United States*, 341 U. S. 494, 508 [1950]). It has, in fact, specifically held that the exercise of First Amendment freedoms may be restricted to protect other vital interests of the Government which are clearly necessary to the effectuation of proper Congressional power (*Schenck v. United States*,

* Although petitioners have not, in their brief herein, made a point of an alleged violation of the First Amendment, they did make the point in the Court of Appeals and they did obtain from the Court of Appeals an amendment of the remittitur to indicate that this point was presented to and necessarily passed upon by the Court of Appeals (Appendix B to Petition, p. 38). Accordingly, we address a few remarks to this point.

supra; *American Communications Association v. Douds*, 339 U. S. 382, 394, 402-404 [1950]; *Dennis v. United States*, *supra*, pp. 509-510; see also *Barenblatt v. United States*, 360 U. S. 109, 126 [1959]).

POINT IV

The action of the respondent did not violate the Fourteenth Amendment; it did not deny the petitioners due process or equal protection of the laws.*

Insofar as the petitioners predicate a violation of the Fourteenth Amendment on an alleged lack of a hearing, they are faced with a record showing the contrary fact. As has been heretofore stated,[†] the Industrial Commissioner was under no burden, in establishing a *prima facie* case, of adducing evidence respecting the nature and character of the Communist Party; he could rely on the doctrine of judicial notice, or he could rely on the Congressional findings in the Communist Control Act,^{††} or both. However, it must be made clear that this was purely for

*The petitioners have no right to claim a violation of the 14th Amendment, under which consideration is given to the privileges or immunities of "citizens of the United States" (*Slaughterhouse Cases*, 16 Wall. 36 [1873]).* Numerous decisions have held that only natural persons are to be considered citizens under this provision (*Hague v. C. I. O.*, 307 U. S. 496, 514 [1939]; *Western Turf Ass'n. v. Greenberg*, 204 U. S. 359 [1907]; see also, the concurring opinion of Mr. Justice BLACK in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 144 [1951]).

† See *supra* pp. 3-4, 6-7.

†† Due process does not require that the Congressional findings in Section 2 of the Act as to the existence of a world or an American Communist movement and as to the character thereof be the subject of redetermination before the Referee or the Appeal Board. These are general legislative findings supporting the Act as a whole and may be

(Footnote continued on following page)

the purpose of establishing a *prima facie* case. The petitioners were free to submit any rebuttal evidence. The record clearly reveals that ample opportunity was afforded them to submit such evidence as they wished with respect to the nature and character of the Party but they failed to avail themselves of the proffered opportunity. They must be deemed to have waived this objection.

Insofar as the petitioners predicate a violation of due process on the lack of justification for the Commissioner's determination, conceding the criminal character of the petitioners, the respondent necessarily relies, in support thereof, on the provisions of the Communist Control Act which terminated their rights, privileges and immunities.

As to the alleged violation of the equal protection clause, a distinction must be drawn between an individual or an entity found guilty of a crime, but which is engaged in a legitimate business totally unrelated to the criminal acts, and an entity such as the Communist Party whose criminal character and activities so permeate its every fibre that it is not inherently or otherwise capable of engaging in any legal activities. Its criminal character and activities have a direct relationship to its inability to possess legal viability (*Sprott v. United States*, 20 Wall. 459, 464-465 [1874]).

(Footnote continued from preceding page)
 used, subject to evidentiary rebuttal, as the basis for a *prima facie* case supporting administrative action. This Court has specifically recognized the validity of such legislative findings (*Galvan v. Press*, 347 U. S. 522, 529 [1953]; *Carlson v. Landon*, 342 U. S. 524 [1953]). Even in the dissenting opinion of Mr. Justice FRANKFURTER in the last cited case, at page 565, he stated "The immigration authorities were by the Act relieved of proving—in order to make a *prima facie* case—that the Communist Party is an 'organization * * * that believes in, advises, advocates or teaches * * * the overthrow by force or violence of the Government.'"

Conclusion

Each of the petitioners' contentions have so consistently and repeatedly been decided by this Court adversely to such contentions that it cannot be said that there exists here a substantial federal or constitutional question.

We respectfully request this Court to deny the Petition for Writ of Certiorari.

Dated: Albany, New York, November 9, 1960.

Respectfully submitted,

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APPENDIX

Subversive Activities Control Act of 1950.

(50 U. S. Code § 781, *et seq.*, 64 Stat. 987, *et seq.*)

“§ 781. CONGRESSIONAL FINDING OF NECESSITY

As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress finds that—

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

(2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality.

(3) The system of government known as a totalitarian dictatorship is characterized by the existence of a single political party, organized on a dictatorial basis, and by substantial identity between such party and its policies and the government and governmental policies of the country in which it exists.

(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

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(5) The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

(6) The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves.

(7) In carrying on the activities referred to in paragraph (6) of this section, such Communist organizations in various countries are organized on a secret, conspiratorial basis and operate to a substantial extent through organizations, commonly known as 'Communist fronts', which in most instances are created and maintained, or used, in such manner as to conceal the facts as to their true character and purposes and their membership. One result of this method of operation is that such affiliated organizations are able to obtain financial and other support from persons who

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would not extend such support if they knew the true purposes of, and the actual nature of the control and influence exerted upon, such 'Communist fronts'.

(8) Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement.

(9) In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

(10) In pursuance of communism's stated objectives, the most powerful existing Communist dictatorship has, by the methods referred to above, already caused the establishment in numerous foreign countries of Communist totalitarian dictatorships, and threatens to establish similar dictatorships in still other countries.

(11) The agents of communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law.

(12) The Communist network in the United States is inspired and controlled in large part by foreign agents who are sent into the United States ostensibly as attachés of foreign legations, affiliates of international organizations, members of trading commissions, and in similar capacities, but who use their diplomatic or semidiplomatic status as a shield behind which to engage in activities prejudicial to the public security.

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(13) There are, under our present immigration laws, numerous aliens who have been found to be deportable, many of whom are in the subversive, criminal, or immoral classes who are free to roam the country at will without supervision or control.

(14) One device for infiltration by Communists is by procuring naturalization for disloyal aliens who use their citizenship as a badge for admission into the fabric of our society.

(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States."

Appendix

Communist Control Act of 1954.(50 U. S. Code §§ 841, *et seq.*; 68 Stat. 775 *et seq.*)

“§ 841. FINDINGS AND DECLARATIONS OF FACT

The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchal chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence.

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Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed.

§ 842. PROSCRIPTION OF COMMUNIST PARTY, ITS SUCCESSORS, AND SUBSIDIARY ORGANIZATIONS

The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are hereby terminated: *Provided, however,* That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended.

§ 843. APPLICATION OF INTERNAL SECURITY ACT OF 1950 TO MEMBERS OF COMMUNIST PARTY AND OTHER SUBVERSIVE ORGANIZATIONS; DEFINITION

Whoever knowingly and willfully becomes or remains a member of (1) the Communist Party, or (2) any other organization having for one of its purposes or objectives the establishment, control, conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political sub-

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division thereof, by the use of force or violence, with knowledge of the purpose or objective of such organization shall be subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a 'Communist-action' organization.

(b) For the purposes of this section, the term 'Communist Party' means the organization now known as the Communist Party of the United States of America, the Communist Party of any State or subdivision thereof, and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name hereof.

§ 844. SAME; DETERMINATION BY JURY OF MEMBERSHIP, PARTICIPATION, OR KNOWLEDGE OF PURPOSE

In determining membership or participation in the Communist Party or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented, as to whether the accused person:

(1) Has been listed to his knowledge as a member in any book or any of the lists, records, correspondence, or any other document of the organization;

(2) Has made financial contribution to the organization in dues, assessments, loans, or in any other form;

(3) Has made himself subject to the discipline of the organization in any form whatsoever;

(4) Has executed orders, plans, or directives of any kind of the organization;

(5) Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the organization;

(6) Has conferred with officers or other members of the organization in behalf of any plan or enterprise of the organization;

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(7) Has been accepted to his knowledge as an officer or member of the organization or as one to be called upon for services by other officers or members of the organization;

(8) Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plans of the organization;

(9) Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization;

(10) Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization;

(11) Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the organization or to anyone else in behalf of the objectives of the organization;

(12) Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization;

(13) Has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization;

(14) The enumeration of the above subjects of evidence on membership or participation in the Communist Party or any other organization as above defined, shall not limit the inquiry into and consideration of any other subject of evidence on membership and participation as herein stated."

Feinberg Law (L. 1949, ch. 360, § 1)

"The legislature hereby finds and declares that there is common report that members of subversive

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groups, and particularly of the communist party and certain of its affiliated organizations, have infiltrated into public employment in the public schools of the state. This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. * * * The legislature further finds and declares that in order to protect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced. * * *

Report of (United States) House of Representatives Committee on Un-American Activities relative to the Internal Security Act of 1950 (House Report No. 2980, dated August 22, 1950; U. S. Code Congressional and Administrative News 1950, p. 3886)

"Necessity For Legislation

The need for legislation to control Communist Activities in the United States cannot be questioned.

Over 10 years of investigation by the Committee on Un-American Activities and by its predecessor committee has established (1) that the Communist movement in the United States is foreign-controlled; (2) that its ultimate objective with respect to the United States is to overthrow our free American institution in favor of a Communist totalitarian dictatorship to be controlled from abroad; (3) that its activities are carried on by secret and conspiratorial methods; and

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(4) that its activities, both because of the alarming march of Communist forces abroad and because of the scope and nature of Communist activities here in the United States, constitute an immediate and powerful threat to the security of the United States and to the American way of life.

The Communist program of conquest through treachery, deceit, infiltration, espionage, sabotage, corruption, and terrorism has been carried out in country after country and is an ever-growing threat to the national security of this and other countries. There is ample evidence that one of the primary objectives of the world Communist movement, directed from within the most powerful existing Communist totalitarian dictatorship, is to repeat this pattern in the United States.

There is incontrovertible evidence of the fact that the Communist Party of the United States is dominated by such totalitarian dictatorship and that it is one of the principal instrumentalities used by the world Communist movement, in its ruthless and tireless endeavor to advance the world march of communism.

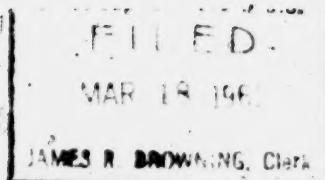
The findings which support these conclusions, and the vast quantity of evidence on which they are based, are set forth in detail in the numerous reports which this committee and its predecessors have printed and circulated. Corroboration has been supplied by independent and exhaustive research by other committees of Congress.

Concern over this threat is not limited to the legislative branch of our Government. At the present time 30 of the 70 major countries in the world have outlawed the Communist Party. Many other countries have adopted various legislative decrees against communism, and since 1947 the trend has been toward declaring all Communist activities illegal. Panama was the latest to take such action. This action came in April of this year. * * *

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Concern over the Communist threat has not been overlooked by the different State legislatures. At the present time 33 States have laws against the displaying of the 'Red' flag; 12 States have criminal anarchy laws; 16 have criminal syndicalism laws; 22 have sedition laws; 16 have laws against the Communist Party candidates appearing on the election ballot; 19 States exclude Communists from public employment; 28 States require loyalty oaths of all employees; and 20 States require teachers to take loyalty oaths."

FILE COPY



IN THE

Supreme Court of the United States

October Term, 1960

No. 495

COMMUNIST PARTY, U. S. A. and COMMUNIST
PARTY OF NEW YORK STATE,

Petitioners,

v.

MARTIN P. CATHERWOOD,
as Industrial Commissioner,

On Writ of Certiorari to the Court of Appeals of New York

BRIEF FOR PETITIONERS

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No. 495

COMMUNIST PARTY, U. S. A. and COMMUNIST
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v.

MARTIN P. CATHERWOOD, as Industrial Commissioner.

On Writ of Certiorari to the Court of Appeals of New York

BRIEF FOR PETITIONERS

Opinions Below

The opinions of the Court of Appeals of New York are reported in 8 N. Y. 2d 77 and appear at R. 36.¹ The opinion of the Appellate Division, Third Department, of the Supreme Court of New York is reported in 8 App. Div. 2d 918 and appears at R. 33.

Jurisdiction

The judgment of the Court of Appeals is dated and was entered on May 26, 1960 (R. 46). On July 15, 1960, an order was entered by Mr. Justice Frankfurter extending

¹ "R." designates the record as printed in this Court and "Tr." the record as printed for the use of the Court below.

the time for filing a petition for certiorari to October 24, 1960 (R. 49). The petition for certiorari was filed on October 20, 1960 and was granted on December 12, 1960 (R. 50).² Jurisdiction of this Court is conferred by 28 U. S. C. 1257.

Statutes Involved

The pertinent provisions of the Communist Control Act of 1954 (50 U. S. C. 841-44), the New York Unemployment Insurance Law (Labor Law, secs. 500-643), and the Federal Unemployment Tax Act (26 U. S. C. Chap. 23), are set forth in Appendix A.

Questions Presented

1. Whether the Court of Appeals erred in construing section 3 of the Communist Control Act of 1954 (50 U. S. C. 842) as terminating the liability of petitioners to taxation as employers under the New York Unemployment Insurance Law.

2. Whether the Court of Appeals erred in holding that section 3 of the Communist Control Act, on its face and as construed and applied, does not violate the Constitution of the United States.

3. Whether the Court of Appeals erred in holding that the action of the respondent Industrial Commissioner in refusing to accept unemployment insurance taxes from petitioners and in suspending their registrations as contributing employers under the New York Unemployment Insurance Law does not deny petitioners due process of law and the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

² On the same date, the Court also granted petitioner's motion for leave to substitute Martin P. Catherwood for Isador Lubin as the party respondent (*ibid.*).

Statement of the Case

The ultimate issue which this case presents is the validity of the action of the Industrial Commissioner in determining that petitioners are not liable to be taxed as employers under the New York Unemployment Insurance Law and in refusing to accept further tax payments from them. The Industrial Commissioner's action injures petitioners in two respects. First, it triples their taxes under the coordinated system of federal and state unemployment insurance taxation (see *infra*, pp. 6-8). Second, it handicaps them in securing and retaining employes by rendering it doubtful, at best, whether an applicant for unemployment insurance will receive credit for his employment by petitioners subsequent to the Commissioner's action (see *infra*, p. 6, n. 9).

The action of the Industrial Commissioner was taken in March, 1957. For the preceding twenty years, the Industrial Commissioner had collected taxes from petitioners as employers liable to "contributions"³ under New York's Unemployment Insurance Law and had paid out unemployment insurance benefits based on employment by petitioners (R. 22, 25, 34). Like all other taxable employers, each petitioner had been assigned a registration number identifying it for collection and accounting purposes (R. 34).⁴

In January, 1957, in response to an inquiry from the Industrial Commissioner, the Attorney General of New York rendered an opinion (Appendix B to this brief) that petitioners are not subject to taxation under the Unemployment Insurance Law and that employment by them should not be credited as a basis for benefits under the law. The

³ The term used in the Unemployment Insurance Law to denote the taxes which it levies on employers with respect to the wages paid by them. See Labor Law, Sec. 570.

⁴ Registration is an administrative device adopted by the Commissioner but not provided for in the Unemployment Insurance Law.

opinion does not cite any provision of the Unemployment Insurance Law⁵ or other state statute to support these conclusions. It relies on sections 2 and 3 of the Communist Control Act and other legislative and judicial characterizations of petitioners and concludes (*infra*, p. 48) that "the Communist Party is a conspiracy against the Government of the United States and of this State," and therefore "it would be an anomaly in law, not to say amoral and against public policy, for the Communist Party and its employees to be permitted to enjoy the advantages and benefits of this public insurance program."

Acting pursuant to the Attorney General's opinion, the Industrial Commissioner in February, 1957 denied the application of one Albertson for insurance benefits based upon his former employment by the National Party (R. 3, Tr. 44). The following month, again pursuant to the Attorney General's opinion, the Commisisoner notified each petitioner that he had suspended its registration as an employer liable to unemployment insurance contributions and that it should pay no further contributions (R. 14, 17). Administrative review of the determinations of the Industrial Commissioner with respect to Albertson and each petitioner was had in statutory proceedings before an unemployment insurance referee⁶ who consolidated the three cases (R. 3).

The Industrial Commissioner offered no evidence at the hearing before the referee but relied exclusively on the opinion of the Attorney General which had prompted his rulings (R. 20, 23-24). The only evidence with respect to the nature of the activities of the petitioners or their employees was the testimony of Albertson that he had been employed by the National Party⁶ as an assistant labor sec-

⁵ Labor Law, Sec. 620. Secs. 621-626 provide for an administrative appeal to the Unemployment Insurance Appeal Board and for judicial review.

⁶ We so refer to Communist Party, U. S. A. Communist Party of New York State is referred to as the "State Party."

retary with the duties of studying trends in the labor movement and analyzing proposed labor legislation (R. 21).

The referee sustained the Industrial Commissioner both in determining that petitioners are not liable for contributions to the unemployment insurance fund and in denying Albertson insurance benefits based on his employment by the National Party (R. 10, 11). He did so on the ground that sections 2 and 3 of the Communist Control Act declaring that "the Communist Party should be outlawed" and depriving the Party and its subsidiaries of rights, privileges and immunities, terminated the right of petitioners to have employees and, in consequence, extinguished their liability to taxation as employers (R. 6-11). The Unemployment Insurance Appeal Board affirmed these rulings (R. 1-2).

The Appellate Division reversed unanimously. It held that the Communist Control Act did not terminate petitioners' liability for contributions to the state unemployment insurance fund or deprive their employees of credit for unemployment insurance benefits (R. 33).

A divided Court of Appeals, reversing the Appellate Division, held that petitioners are not liable to taxation under the state law. However, it affirmed the decision of the Appellate Division that Albertson was entitled to credit for his employment by the National Party in determining his unemployment insurance benefits. (R. 36-45.)⁷

⁷ Albertson's claim for benefits involved another issue not material here—his right to credit for employment by the Civil Rights Congress, an alleged "Communist-front" organization. The referee ruled that Albertson was entitled to such credit and hence should be paid benefits, although in an amount less than he would receive were he also credited with his employment by the National Party (Tr. 26-27). The Unemployment Insurance Appeal Board, reversing the referee, disallowed credit for the Civil Rights Congress employment and held Albertson ineligible for benefits (Tr. 11-13). This issue is not mentioned in the opinions below, but the effect of the judgment is to credit Albertson with his employment by the Civil Rights Congress as well as by the National Party.

The six judges who participated in the case handed down three separate opinions, two judges joining in each.* The prevailing opinion construed section 3 of the Communist Control Act as depriving petitioners of the status of employers under the Unemployment Insurance Law for "whatever value the status may have" and held that the act, as so construed, is constitutional. It further held, however, that since Albertson's employment by the National Party ended before the Industrial Commissioner suspended the latter as an employer liable to contributions, "it would be unreasonably punitive" to deny him his insurance. (R. 36-39.)⁹ Another opinion concurred with the first as to the construction and constitutionality of the Communist Control Act and its effect upon petitioners, but held that Albertson was not entitled to unemployment insurance (R. 44-45). The third opinion held that the Communist Control Act did not affect petitioners' liability to taxation under the state law or Albertson's right to insurance benefits (R. 39-44).

As previously noted, the effect of the action of the Industrial Commissioner and its affirmance below is to triple petitioner's tax liability under the system of interrelated federal and state unemployment insurance taxation.

When petitioners were liable to state taxation, they enjoyed low tax rates under New York's experience rating

* Judge Foster, who was the presiding judge of the Appellate Division when the case was heard and decided there, did not participate (R. 45).

⁹ The opinion reserved the question of the status of claims for benefits based on employment by one of the petitioners subsequent to the action of the Industrial Commissioner (R. 39). However, the logic of the opinion would seem to require the denial of such claims. And the Industrial Commissioner's brief in opposition to the petition for certiorari states (p. 1, n.): "Suspension of registration as an employer results in the exclusion of the employer from the operation of the Unemployment Insurance Law so that it is thereby deprived of the opportunity of affording to its employees the benefits of the law. It is thus gravely handicapped in securing employees."

plan which reduces the normal rate of 2.7% of payroll for those employers who have records of maintaining steady employment.¹⁰ At the time the Industrial Commissioner terminated their liability to taxation, the tax rate of the National Party was 0.7% of its payroll and that of the State Party was 0.8% of its payroll (R. 25).¹¹

Despite the action of the Industrial Commissioner, the Bureau of Internal Revenue has continued to collect taxes from petitioners under the Federal Unemployment Tax Act, 26 U. S. C. 3301-3308 (R. 34, 38, 40, 41). That act taxes employers at the rate of 3% of their payrolls¹² but allows a credit against the tax for payments made to state unemployment insurance funds (secs. 3301, 3302). In the case of an employer who makes payments to the fund of a state which, like New York, has an approved experience rating plan, the credit results in a federal rate of taxation of either 0.3% or the difference between 3% and the maximum rate specified in the state law, whichever rate is higher (sec. 3302 (b), (c)(1) and (d)(1)). Since the maximum rate provided by the New York law is 3.2% (see fn. 10, *supra*), employers who are taxed by New York pay a federal tax at the 0.3% rate. Accordingly, so long as New York taxed

¹⁰ The 2.7% rate is specified in Section 570 of the Labor Law. Section 581 provides for experience rating in accordance with a complex formula, the material features of which have been described as follows: "Newly liable employers * * * are taxed at the rate of 2.7% on wages * * * paid during a calendar year. Older firms are taxed at individual rates which may be as high as 3.2% and as low as zero % depending upon their individual experience with unemployment and on the adequacy of the Unemployment Insurance Fund as a whole." *1960-61 Handbook for Employers*, N. Y. Department of Labor, Division of Employment, p. 20.

¹¹ The reference is to the evidence with respect to the National Party. The State Party's tax rate appears from the Industrial Commissioner's records and is not disputed.

¹² Increased to 3.1% for 1961 and thereafter by amendment to Section 3301 adopted September 13, 1960.

petitioners, their liability for state and federal taxes aggregated 1% of payroll for the National Party and 1.1% for the State Party.¹³ The termination of petitioners' liability to state taxation tripled their tax burden by depriving them of the credit they previously enjoyed under section 3302 of the federal act and subjecting them to taxation at the full 3% rate specified in section 3301.¹⁴

Summary of Argument

I. The court below erroneously construed and applied section 3 of the Communist Control Act.

A. Section 3 terminates certain rights, privileges and immunities of petitioners. New York's Unemployment Insurance Law, however, does not grant any rights, privileges or immunities but imposes a liability to pay taxes. Section 3 does not purport to extinguish petitioners' liabilities.

The Unemployment Insurance Law does not grant a right to be listed or enrolled as an employer. Such listing is merely a bookkeeping incident to the liability of employers to taxation. It is true that, under the circumstances of this case, liability to state taxation benefits petitioners by reducing their aggregate tax payments under the state and federal laws and by providing an inducement for the

¹³ A state tax at the rate of 0.7% for the National Party and 0.8% for the State Party plus, in each case, the 0.3% federal tax.

¹⁴ On November 21, 1958, while petitioner's appeal from the ruling of the Appeal Board was pending in the Appellate Division, the Bureau of Internal Revenue notified each petitioner of a tax deficiency resulting from the termination of its contributions to the state unemployment insurance fund and the increase in the applicable federal rate from 0.3% to 3%. Petitioners' attorney advised the Bureau of the pendency of litigation to reverse the ruling of the Industrial Commissioner, and the Bureau has continued to accept payments at the 0.3% rate.

acceptance of employment with them. But the incidence of these benefits does not transmute the liability of petitioners to taxation into a "right to be taxed."

B. Respondent argues that the obligation to pay the unemployment insurance tax arises from the exercise of the right to be an employer; that section 3 terminated this right as to petitioners and therefore extinguished their concomitant liability to taxation. Respondent's argument is fallacious because section 3 does not terminate the right of petitioners to be employers.

1. Section 3 terminates only those rights of petitioners "which have heretofore been granted * * * by reason of the laws of the United States or any political subdivision thereof." The right of natural persons to employ others is not a right granted them by government. It is a natural, inherent, or inalienable right. Accordingly, it is not among the rights which section 3 purports to terminate.

Petitioners are unincorporated associations. In New York, these are not artificial entities owing their existence to a franchise from the state but are creatures of contract having no existence independent of their members. Accordingly, the right that is in issue here is the right of petitioners' members, collectively, to employ others. That right is no less an inherent right than the right of a single member to be an employer.

2. Assuming that the right of petitioners to be employers is a granted and not an inherent right, it is a right granted by the laws of New York and not of the United States. Section 3 terminates rights granted petitioners "by reason of the laws of the United States or any political subdivision thereof." This provision does not affect rights granted by state law. For the states are not "political subdivisions" of the United States. Moreover, if Congress had intended to take the extraordinary step of extinguishing rights granted by the states, it would have done so without equivocation.

Interpretation of section 3 to exclude rights granted by state law is also required by constitutional considerations. Section 3, as construed below, deprives petitioners of the right to employ persons for any purpose whatsoever. But under its granted powers and the Tenth Amendment, Congress may not regulate, much less terminate, rights dependent solely on state law and unrelated to any matter within the competence of the national government.

3. Notwithstanding the recital of section 2 of the Communist Control Act that "the Communist Party should be outlawed" and the termination of rights provided in section 3, Congress intended to permit the Party to continue to function through employees, officers and agents. This appears from numerous provisions of that Act, including the proviso of section 3 that it shall not be construed as amending the Internal Security Act.

C. The construction of section 3 by the court below is without support in the legislative history and is contrary to the construction of the section by the federal executive and by Congress.

A review of the legislative history reveals that section 3 was not the subject of any committee report but was added to the legislation on the floor of the House without committee consideration. The floor debates cast no light on the intention of Congress with respect to section 3 but merely document Senator Kefauver's observation that, "In this matter, I think we are giving a clear and impressive picture of how legislation should not be written."

The federal authorities have taken no action in any field to apply the fiat deprivation of rights, privileges and immunities contained in section 3. The Bureau of Internal Revenue, although aware of the Industrial Commissioner's ruling, continues to tax petitioners as employers under the Federal Unemployment Tax Act and the Federal Insurance Contributions Act. Similarly, a Social Security Ad-

ministration referee ruled, subsequent to enactment of the Communist Control Act, that petitioners are employers whose retired employees are entitled to old age benefits. *Matter of Foster.*

Subsequent to the *Foster* decision, Congress amended the Social Security Act and the Insurance Contributions Act to exclude from coverage and taxation services in the employ of an organization only after the date on which it is finally ordered to register as a Communist-action or Communist-front organization under the Internal Security Act. By this legislation, Congress acquiesced in the proposition acted on by the Bureau of Internal Revenue and the referee in *Foster* that petitioners remain liable to employment taxes notwithstanding the enactment of the Communist Control Act. Moreover, if Congress had construed the Communist Control Act as terminating the liability of petitioners to taxation as employers, it would not have amended the Insurance Contributions Act in a manner which will exclude them from such taxation only in the event that they are finally ordered to register as Communist-action organizations.

II. Section 3 of the Communist Control Act is unconstitutional on its face and as applied below.

A. Section 3 violates the due process clause of the Fifth Amendment.

1. The evil with which the Communist Control Act purports to deal is the threat to the national security from activities of the Communist Party described in section 2. But section 3 is not restricted to the prohibition or control of Party activities which threaten the national security. As construed and applied below, the section deprives petitioners of the right to engage, through employees or otherwise, in lawful and peaceable conduct. Accordingly, the section violates the due process principle that legislation must be "reasonably restricted to the evil with which it is said to deal."

2. Section 3 deprives petitioners of liberty and property. The justification for the deprivation, as stated in section 2, is that petitioners are members of a criminal conspiracy, controlled by a hostile foreign power, to overthrow the government. The Act accords petitioners no hearing on this charge but deprives them of their liberty and property solely on the basis of the legislative fiat. The Act, therefore, violates the requirement of a hearing on charges which are relied upon to support a deprivation of rights protected by due process.

B. Section 3 is a bill of attainder. It imposes punishment because the deprivation of rights which it decrees is based solely on criminal conduct attributed to petitioners and because nothing that the "persons proscribed by its terms could ever do would change the result." Moreover, section 3 was "aimed at the persons or classes of persons disqualified" rather than at any particular activity. The proposition that section 3, as construed below, is a bill of attainder is also established by *United States v. Lovett*.

C. Section 3 is an *ex post facto* law because it imposes punishment for past conduct in addition to that previously prescribed and does so without requiring any proof of such conduct.

D. As shown in Point I B 2, section 3, as construed below, is not within the competence of Congress and violates the Tenth Amendment.

IV. The action of the Industrial Commissioner denied petitioners due process of law and the equal protection of the laws in violation of the Fourteenth Amendment.

The prevailing opinion seems at some points to hold that petitioners' status as contributing employers under the New York Unemployment Insurance Law was terminated, not by section 3 of the Communist Control Act, but by action on the part of New York. And the amended remittitur states that the court below held that the action of the In-

dustrial Commissioner in suspending petitioners as contributing employers did not violate the due process or equal protection clauses of the Fourteenth Amendment.

The sole justification for the action of the Industrial Commissioner, when viewed as state action, was the opinion of New York's Attorney General pursuant to which the action was taken. Accordingly, it is this opinion which must be looked to in determining whether the Industrial Commissioner's action, depriving petitioners of liberty and property, denied them due process or equal protection.

A. The ruling of the Attorney General was based on his allegation that the Communist Party is a conspiracy against the government. Yet, there is no instance in which an employer has been excepted from coverage under any of New York's social insurance laws even after a conviction for conducting his affairs in violation of the criminal laws. The action of the Industrial Commissioner in singling out petitioners was therefore arbitrary as well as discriminatory. Accordingly, it denied them due process and equal protection.

B. The action of the Industrial Commissioner violates the principle applied in *Sweezy v. New Hampshire*. For this case, like *Sweezy*, presents a situation equivalent to one where it appears that "no state interest underlies the state action." For although the state legislature had frequent occasion to do so, it never authorized the Industrial Commissioner to take the action that he did or gave other indication that the exclusion of petitioners from unemployment insurance taxation was in the interest of the state.

C. Since the action of the Industrial Commissioner was taken without a hearing on the Attorney General's charges against petitioners, the action violated the due process principle stated in Point II A 2. Under the decision below, it was not open to petitioners to disprove the Attorney General's charges at the hearing before the referee. Moreover, an opportunity to petitioners to disprove charges

which would otherwise have been taken as true would not have satisfied due process.

D. Assuming a discernible state interest in excluding petitioners from taxation with respect to their employment of employees engaged in illegal activity, the action of the Industrial Commissioner violates due process because the exclusion is not so restricted.

ARGUMENT

I. The court below erroneously construed and applied section 3 of the Communist Control Act.

A. The obligation to pay unemployment insurance taxes is not a right, privilege or immunity.

Section 3 of the Communist Control Act terminates "whatever rights, privileges and immunities which have heretofore been granted to [petitioners] by reason of the laws of the United States or any political subdivision thereof." Assuming that New York is a "political subdivision" of the United States (see *infra*, p. 19), its Unemployment Insurance Law does not grant petitioners any right, privilege or immunity. On the contrary, the law imposes a liability upon them—the liability to pay taxes.¹⁵ Since the Communist Control Act does not purport to and obviously was not intended to extinguish the liabilities of petitioners, it does not affect their liability to unemployment insurance taxation. Two members of the Court of Appeals and an unanimous Appellate Division so held (R. 35, 43-44).

The prevailing opinion itself acknowledges (R. 37) that, "Of course, paying a tax is not really claiming an 'immunity' or 'right.'" It states however (*ibid.*), that "with the payment of this particular tax goes a status and enrollment as an employer," and adds that "whatever value that

¹⁵ As the dissenting opinion states (R. 43-44), "the status of an employer under the Unemployment Insurance Law involves, and is expressly denominated a 'liability' (see, e.g., Labor Law, Secs. 560, 561, 562, 570, 572, 579), the duty to pay 'an excise tax.'"

status may have is being sought and claimed by the Communist Parties in this proceeding.¹⁵ The opinion also refers to "the alleged rights of Communist Parties to recognition and listing," and states that petitioners "are demanding that they be restored to this State's list of employers" (R. 37, 38). Thus the prevailing opinion seems to reason that the Unemployment Insurance Law creates a "right" to be enrolled or listed as an employer; that section 3 of the Communist Control Act terminated this right with respect to petitioners, and that their liability to taxation was somehow extinguished along with the right. This reasoning is palpably unsound.

The opinion does not cite any provision of the Unemployment Insurance Law for the "enrollment" or "listing" of which it speaks and the Law contains no such provision. Apparently what the opinion refers to is the Industrial Commissioner's practice of assigning a registration number to each taxable employer to identify it for the purposes of collection and accounting.¹⁶

Registration does not confer any rights upon employers. It is merely a bookkeeping incident to their liability to taxation.¹⁷ Contrary to the statement in the prevailing

¹⁶ "Each employer liable for tax is assigned an Employer Registration Number * * * This number—and no other—should be shown on all correspondence and forms submitted by the Employer to this Division." 1960-61 *Handbook for Employers*, *supra*, p. 12, emphasis in the original. "All liable employers are required to submit each quarter reports of total remuneration (see pp. 15-16), and wages (see p. 15) for the purpose of determining the amount of quarterly tax due. This form is mailed to registered employers in advance of the due date and carries the employer's name, address and Employer Registration Number." *Id.*, p. 14. "For every employer subject to the Law an individual account is set up as a bookkeeping device for measuring his Benefit Experience, the principal factor in determining his tax rate." *Id.*, p. 20.

¹⁷ Conversely, the suspension by the Industrial Commissioner of the registrations of petitioners (R. 15, 18) was simply the bookkeeping expression of his determination that petitioners are not subject to taxation.

opinion (R. 38), petitioners are not "demanding that they be restored to this State's list of employers." Nor are they claiming (R. 37) "whatever value that status has" for it has none. What petitioners are demanding is recognition of their liability to taxation under the Unemployment Insurance Law and acceptance by the Industrial Commissioner of the taxes which the Law levies upon them.

It is true that liability to the state tax, in the circumstances of this case, benefits petitioners (1) by substantially reducing their aggregate tax payments under the state and federal laws and (2) by providing their employees with the certainty of insurance coverage as an inducement to employment (see *supra*, pp. 6-8). But the incidence of these benefits does not transmute the liability of petitioners to taxation into a "right to be taxed."

B. Section 3 of the Communist Control Act does not terminate the right of petitioners to be employers.

Respondent argues (Brief in Opposition to Petition for Certiorari, pp. 12-13) that while the tax imposed by the Unemployment Insurance Law creates an obligation and not a right, the obligation arises only from the exercise of a right—the right to be an employer¹⁸ and to enter into contracts of employment. His contention is that section 3 of the Communist Control Act terminated this right of petitioners and therefore extinguished their concomitant liability to taxation. This theory of the case was first enunciated by the referee (R. 6-7) and also appears in the concurring opinion below (R. 45). The theory rests on a fallacious interpretation of section 3, which, as we will show, does not terminate the right of petitioners to be employers.

¹⁸ The term "employer" is broadly defined by Labor Law, Sec. 512 as "any person, partnership, firm, association, public or private, domestic or foreign corporation * * *"

1. *Section 3 does not terminate natural or inherent rights.*

Section 3 does not purport to terminate all rights of the petitioners but only those "which have heretofore been granted * * * by reason of the laws of the United States or any political subdivision thereof." The right of natural persons to employ others is not a right granted them by government. It is a natural or inherent right, included among the inalienable rights, referred to in the Declaration of Independence, with which all men are endowed and to secure which governments are instituted. *Prudential Insurance Co. v. Check*, 259 U. S. 530, 537; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 762 (concurring opinion); *Lochner v. New York*, 198 U. S. 45, 65 (dissenting opinion); *Coppage v. Kansas*, 236 U. S. 1, 14; *Stewart Machine Co. v. Davis*, 301 U. S. 548, 580. Accordingly, were petitioners natural persons, their right to be employers would not be among the rights terminated by section 3.¹⁹

Petitioners are unincorporated associations (R. 38). The prevailing opinion states (*ibid.*) that "all rights of unincorporated associations are created by and dependent upon the State." No authority is cited for this statement and it is palpably erroneous. In New York, an unincorporated association, unlike a corporation, is not an artificial entity and does not owe its existence to a franchise from the state. The author of the prevailing opinion himself has held that an unincorporated association "is not an artificial person and has no existence independent of its members."²⁰ *Martin v. Curran*, 303 N. Y. 276, 280. Similarly, it has been stated that, "Unincorporated associations are mere

¹⁹ At this point, we do not consider whether Congress *could* terminate natural rights of the petitioners but only whether it *did* terminate them.

²⁰ Cf. his holding in the present case (R. 37) that as a result of section 3 "the artificial body or entity calling itself the Communist Party is to be deprived of all the 'rights, privileges and immunities' that other such entities have."

creatures of contract freely formed at common law without any grant from the sovereign." *People v. Norwegian Underwriters*, 247 N. Y. S. 707, 711. And see *Ostrom v. Greene*, 161 N. Y. 353, 361.

The only right that New York has granted to unincorporated associations is the right to sue in the names of their presidents or treasurers. General Association Law, sec. 12. This statute modifies the common law rule that all members of an unincorporated association are necessary parties to an action by or against it. *Van Aernam v. Bleistein*, 102 N. Y. 355, 358. However, the modification was made for convenience only "and created no new substantive right." *Martin v. Curran*, *supra*, at 281.

Accordingly, the right that is in issue here is the right of petitioners' members, collectively, to employ others. That right is no less an inherent right than the right of a single member to be an employer. Hence, it is not among the rights which section 3 purports to terminate.²¹

2. *Section 3 does not terminate rights granted by state law.*

If, contrary to what we have shown, the right of petitioners to be employers is held to be a granted rather than an inherent right, it is a right granted by the laws of New York and not the United States. The prevailing opinion below acknowledged as much, stating (R. 38) that "all rights of unincorporated associations are created by and dependent upon the State." By the same token, section 3 does not disturb these rights.

²¹ Not even the respondent contends that section 3 terminated petitioners' statutory right (fn. 5, *supra*) to secure review of determinations of the Industrial Commissioner, and that this proceeding must therefore be dismissed. Respondent's restraint is the more remarkable in view of his assertion that petitioners are beyond the pale of due process and the Bill of Rights. Brief in Opposition to Petition for Certiorari, pp. 16-18.

Section 3 purports to terminate all rights granted to petitioners "by reason of the laws of the United States or any political subdivision thereof." This provision does not affect rights which petitioners enjoy by virtue of state law. For the states are not "political subdivisions" of the United States. A subdivision is, "A part of a thing made by subdividing." Webster, *New International Dictionary*. The states, of course, were not "made by subdividing" the nation but themselves "made" the United States.²²

Moreover, if Congress had intended to take the extraordinary step of extinguishing rights granted by the states, it would have done so without equivocation. As the dissenting opinion below states (R. 44), "If Congress had been intent upon depriving the Communist Party of its ability to enter into contracts or hire employees, it could easily and unmistakably have so provided."

To interpret section 3 as terminating rights granted by state law is not only contrary to its text but violates the principle that, wherever possible, statutes should be construed so as to avoid questions of constitutionality. *United States v. Rumely*, 345 U. S. 41; *United States v. Witkovich*, 335 U. S. 194; *United States v. Five Gambling Devices*, 346 U. S. 441.

As construed below, section 3 deprives petitioners of the right to employ persons for any purpose whatsoever. But under its granted powers and the Tenth Amendment, Congress may not legislate with respect to rights which are dependent solely on state law. It may not, for example,

²² Significantly, the first clause of Section 3 speaks of "the Government of the United States, or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein" (emphasis supplied). Section 4 is similarly worded as is 18 U. S. C. 2385. As this wording shows, Congress understands the distinction between a state and a political subdivision, and does not use the latter when it means the former.

restrict the right of an employer to fix the wages and hours of employees whose employment does not substantially affect interstate commerce. *United States v. Darby*, 312 U. S. 100, 117. Obviously, therefore, it may not extinguish the right to be an employer of such employees. Nor, in the exercise of the defense power, may it abrogate a right granted by state law, the exercise of which has no conceivable relation to the national defense.²³

Accordingly, assuming that the right of petitioners to be employers was granted them by the laws of New York, section 3 of the Communist Control Act may not be construed as terminating that right.²⁴

3. *The Communist Control Act contemplates that the Communist Party will continue to have and to act through employees.*

The text of the Communist Control Act makes it clear that, notwithstanding the recital of section 2 that "the Communist Party should be outlawed"²⁵ and the termination of rights provided in section 3, Congress intended

²³ E.g. the right of the National Party to employ Albertson to study trends in the labor movement and analyze proposed labor legislation (R. 21).

²⁴ In the only proceeding other than the present one involving an application of Section 3, it was held that the section abrogated the right of a candidate for state office to run on the Communist Party ticket, *Selven v. Rees*, 16 N. J. 216. The opinion was oral and the case seems to have been inadequately briefed and argued. The question of statutory construction discussed above was not considered, and the constitutional questions argued in Point 41, *infra*, do not appear to have been raised or decided. For a criticism of the decision see Comment in 53 Mich. L. R. 1153, 1160.

²⁵ In oral argument of *Communist Party v. Subversive Activities Control Board*, No. 12, this Term, the Solicitor General stated that this recital has no legal consequence or effect.

to permit the Party to continue to function through employees, officers and agents.²⁶

Thus, section 5 of the Act assumes that the Party will continue to have and to act through "officers", "agents" and "organizers" (paragraphs (5), (6), (7) and (11)). Moreover, if the rights terminated by section 3 include the right to have employees, they must also include the right to have members since no distinction in principle can be drawn between the two. But section 4 contains provisions concerning any person who "becomes or remains a member" of the Communist Party and section 5 enumerates thirteen indicia of membership.

Furthermore, section 3 provides that it shall not be construed as amending the Internal Security Act (50 U. S. C. 781 *et seq.*). The latter permits the Communist Party to have officers and members even if it is finally ordered to register as a Communist-action organization. For section 7(d) (50 U. S. C. 786(d)) requires all registrants to list the names of their officers and members in their registration statement.

In addition, regulations of the Department of Justice issued under the authority of Internal Security Act, and in force when the Communist Control Act was passed, contemplate that the Communist Party, if finally ordered to register, will continue to have and to function through employees. Thus, the regulations contain provisions with respect to the "executive officer" of a registrant who is defined as follows (28 C. F. R. 11.1(f), emphasis supplied):

"The individual who directs the course of business of the organization or who outlines the duties

²⁶ The Department of Justice has stated: "The Communist Control Act of 1954 does not purport to dissolve or require the dissolution of the Communist Party. Enactment of this legislation has not, *per se*, caused said Party to cease to exist as a group of persons associated together for joint action on certain subjects." Brief for Respondent Pursuant to the Court's Order of September 13, 1954 (p. 40) in *Communist Party v. Subversive Activities Control Board*, No. 11850, C. A. D. C.

and directs the work of subordinate employees and who is responsible for the day to day operation of the organization's affairs and for carrying into effect the purposes of his employment."

The regulations also require a Communist-action organization registered under the Act to maintain records which disclose the names and addresses of *employees* of the registrant (28 C. F. R. 11.204(b)).

Accordingly, section 3 of the Communist Control Act could not have been intended to and did not terminate the right of petitioners to have and to function through employees. The argument to the contrary flies in the face of the statute.

C. The construction of Section 3 by the court below is without support in the legislative history and is contrary to the construction of the section by the federal executive and by Congress.

The Communist Control Act was passed in August, 1954, on the eve of the adjournment of Congress for the national election campaign. It had its origin in the Butler Bill, S. 3706, 83rd Cong., 2d Sess. (100 Cong. Rec. 14097) to amend the Internal Security Act by making provisions with respect to "Communist-infiltrated organizations."²⁷ In the course of the floor debate, Senator Humphrey offered an amendment in the nature of a substitute which was later adopted as an addition to the original bill (*id.* pp. 14208, 14229, 14234-36). The heart of the Humphrey amendment was contained in section 3 of the bill passed by the Senate and makes membership in the Communist Party a criminal offense.²⁸

The House rejected section 3 of the Senate bill when informed that the administration opposed it on the ground

²⁷ The substance of the Butler Bill now appears as Section 3(4A) and 13A of the Internal Security Act, 50 U. S. C. 782(4A) and 792(a).

²⁸ Senator Humphrey stated that the purpose of his amendment was to refute the Republican charge that he and his party were "soft" toward Communism" (*id.* pp. 14210, 14212).

that it would jeopardize enforcement of the registration provisions of the Internal Security Act. Instead, the House passed a bill containing section 3 as it was ultimately enacted. (*Id.* pp. 14639-40, 14658.) There were no committee reports on this section. Indeed, the House Judiciary Committee did not even see the House version of section 3 before it was offered on the floor. Moreover, the complete text of the House bill was not available to the members when they voted to adopt it. (*Id.* pp. 14643, 14651.) Representative Celler, the senior minority member of the Judiciary Committee, described the situation as follows (*id.* p. 14643, emphasis supplied):

"Mr. Speaker, this is a most unusual bill—brought up in a most unusual manner. Consider its history—the confusion, the turmoil, the excitement, the haste and the celerity with which it is being considered now at this fag end of the session * * *. We only have a mimeographed copy of this bill that is now before us, and that copy is not complete * * *. The Judiciary Committee never saw the instant bill. It was cooked up over the weekend. It was cut and recut, furbished and refurbished, shuffled and reshuffled. It is indeed a hodgepodge. * * * Now, we are, in a way, buying a pig in a poke. *What does this bill really entail? Nobody really knows.*"

It appears from the House debate that the text of Section 3 was taken from H. R. 8912, which had been introduced by Representative Dies. However, the Dies Bill contained an additional provision, similar to the Humphrey amendment, making membership in the Communist Party a crime (*id.*, p. 14652). Mr. Dies described the effect of the omission of this provision as follows (*ibid.*):

"Here is the situation: You outlaw the Communist Party; you terminate its rights and privileges and its immunities. But you have no provision in the bill to enforce it."

The Senate adopted the House bill but added, as Section 4, the text of Senator Humphrey's original proposal making membership in the Communist Party a crime (*id.*, pp.

14721, 14726, 14728-29).²⁹ The conference committee reported the bill in its final form,³⁰ which retained Section 3 as adopted by both Houses but substituted a new text for the Senate version of Section 4.³¹ The conference report is confined to a statement concerning the latter section and does not mention Section 3 (*id.*, p. 15101).

Apart from the comment of Representative Dies, quoted above, the legislative history contains no interpretations of Section 3 except for expressions of personal opinion by several Senators in the course of the floor debate. These comments are entitled to no weight in construing the Act. *Duplex Co. v. Deering*, 254 U. S. 443, 474. Furthermore, as Senator Morse observed, "almost every possible conflicting point of view which human minds can imagine or concoct has been stated for the Record this morning" (*id.*, p. 15115).³²

²⁹ The Senate also added a section listing thirteen criteria for determining membership in the Communist Party which became Section 5 of the Act (*id.* 14722).

³⁰ "But in fact no formal meeting of the conferees seems to have taken place. Rather the final change was wrought in a backstage compromise between all concerned." *The Communist Control Act of 1954* (Comment), 53 Mich. L. Rev. 1153, 1157.

³¹ The section as enacted makes members of the Communist Party "subject to all of the provisions and penalties of the Internal Security Act of 1950, as amended, as they apply to members of a Communist-action organization." Except that it identifies the Communist Party, by name, as a Communist-action organization, the section adds nothing to what is already provided by the Internal Security Act. The Department of Justice has acknowledged this to be the case. Brief for Respondent Pursuant to the Court's Order of September 13, 1954, *supra*, at pp. 42-45.

³² Thus, Senator Kefauver stated that Section 3 "amounts only to making a speech against the Communist Party" (*id.* p. 14718) and Senator Hennings regarded it as "only a gesture" (*id.* p. 14720). Senator Butler believed that Section 3 "makes the Communist Party impossible" (*id.* p. 14713). Senator Humphrey doubted that Section 3 would bar the Communist Party from the ballot since this is a matter for determination by the states and not by Congress (*id.* p. 14722). Senator Ferguson was alone in suggesting that Section 3 would prevent the Communist Party from hiring persons "under contract" or entering into other contractual relations (*id.* p. 14719).

Accordingly, the legislative history lends no support to the interpretation of Section 3 by the court below. What it does is to document the observation of Senator Kefauver (*id.*, p. 15106) that, "In this matter, I think we are giving a clear and impressive picture of how legislation should not be written."³³

As we will now show, the interpretation below of Section 3 is contrary to that of the federal agencies responsible for its enforcement and of Congress.

When President Eisenhower signed the Communist Control Act he stated that its full impact "will require further careful study" (*N. Y. Times*, Aug. 25, 1954). Such study has resulted in no action by the federal authorities to apply the Act's fiat deprivation of rights, privileges and immunities.³⁴

No attempt has been made, for example, to terminate such federal rights or privileges of the petitioners as their use of the mails or radio, television and other instrumentalities of interstate commerce.³⁵ Nor has the Department of Justice ever suggested that Section 3 deprives petitioners of any procedural right. Cf. *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115, No. 12 this Term.

³³ For examples of public criticism of the substance of the Act and the manner of its adoption, see the newspaper editorials, *id.* pp. 15110-15112.

³⁴ Cf. the conclusion of the author of the comment on the Act in 53 Mich. L. Rev. 1153, 1164: "In the light of the politically charged history of the Communist Control Act, and in view of the difficulty inherent in defining the potential effectiveness of the act, it is conceivable that it will be allowed to die on the statute books. There is, it is submitted, much to be said for such a result."

³⁵ To do so would contravene the proviso of Section 3 against a construction which amends the Internal Security Act. For the Internal Security Act gives the Communist Party access to these facilities, subject to a labelling requirement, even if it is finally ordered to register as a Communist-action organization. See 50 U. S. C. 789.

The Bureau of Internal Revenue, although aware of the Industrial Commission's ruling, continues to tax petitioners under the Federal Unemployment Tax Act (R. 41, *supra*, p. 7). and under the Insurance Contributions Act (R. 31). These federal statutes, like the New York Unemployment Insurance Law, tax employers on the wages paid by them. See 26 U. S. C. 3111, 3301; N. Y. Labor Law, Sec. 570. Definitions of the terms which determine liability to taxation are substantially the same under all three statutes.³⁶ It is clear, therefore, that the Bureau of Internal Revenue rejects the view that the Communist Control Act terminated petitioners' status as employers or their liability to taxation as such.

Similarly, a Social Security Administration referee ruled subsequent to enactment of the Communist Control Act that petitioners are employers whose retired employees³⁷ are entitled to old age benefits. *Matter of Foster*, R. 26-32. In reaching this conclusion, the referee cited the long-standing practice of the Internal Revenue Bureau in taxing petitioners (R. 31) and further stated (R. 29):

³⁶ All three statutes define "Employer" only in terms of inclusions or exclusions which are irrelevant here. Labor Law, Sec. 512; 26 U. S. C. 3121(h), 3306(a). The state statute defines "wages" as "every form of compensation for employment" and defines "employment" as "any service under any contract of employment for hire, express or implied, written or oral." Labor Law, Secs. 511, 517, 518. Both federal statutes define "wages" as "all remuneration for employment" and define "employment" as "any service of whatsoever nature performed * * * by an employee for the person employing him." 26 U. S. C. 3121(a), 3121(b), 3306(b), 3306(c). They define "employee" in terms of "the usual common law rules applicable in determining the employer-employee relationship." 26 U. S. C. 3121(d)(2), 3306(i). The state statute does not define "employee". New York has held that the test of an "employer" is identical under the state and federal unemployment insurance laws. *Savoy Ballroom Corp. v. Lubin*, 146 N. Y. S. 2d 69.

³⁷ The Social Security Acts definition of "employees" (42 U. S. C. 410(k)(2)) is identical with that of the Insurance Contributions Act.

"In reference to the attitude of Congress toward Communism, as expressed in other legislation, and to which the referee will refer later, the referee will point out here that although the subject of Communism has been frequently considered by the Congress, and although there have been frequent and major studies and revisions of the Social Security Act by the Congress in the past two decades, nowhere in the Committee Reports on Social Security legislation, has the Congress suggested that service for the Communist Party in the United States was or should be considered excepted service."³⁸

The *Foster* decision is dated June 21, 1956 (R. 32). A month later, Congress passed comprehensive amendments to the Social Security Act and the Insurance Contributions Act. Among these were provisions excluding from social security coverage and taxation services in the employ of an organization subsequent to the date on which it is finally ordered to register as a Communist-action or Communist-front organization under the Internal Security Act. 42 U. S. C. 410(a)(17) and 26 U. S. C. 3121(b)(17), added by secs. 121(c) and (d) of the Act of August 1, 1956, 70 Stat. 839. These provisions were written into the legislation by the conference committee after the decision in *Matter of Foster* and were evidently inspired by it.³⁹

³⁸ The specific issue before the referee was whether employment by petitioners was excepted from social security coverage as service performed in the employ of a foreign government (R. 27). As appears from the quoted excerpt, however, the decision was not so narrowly confined. And see also R. 30-32.

³⁹ The legislation passed the House on July 18, 1955 (101 Cong. Rec. 10768, 10798). It was reported to the Senate with amendments on June 5, 1956 (Sen. Rep. No. 2133, 84th Cong., 2d Sess. to accompany H. R. 7225). It passed the Senate on July 17, 1956 (102 Cong. Rec. 13103). It went to conference on July 19, 1956 (102 Cong. Rec. 13567) where, as stated above, the provisions in question were added. The conference report was adopted by both Houses without debate (102 Cong. Rec. 14828, 15106-07).

If Congress had believed that the Bureau of Internal Revenue and the *Foster* referee had erred in failing to rule that section 3 of the Communist Control Act excepts petitioners from social security taxation and their employees from coverage, it would have rectified the error by appropriate amendments to the Insurance Contributions Act and the Social Security Act. Instead, it adopted amendments which do not presently except the petitioners from taxation or their employees from coverage and will not except them unless and until petitioners are finally ordered to register as Communist-action organizations.⁴⁰ Accordingly, Congress acquiesced in the proposition that the Communist Control Act did not affect petitioners' liability to employment taxes, and gave that proposition the force of law. *Copper Queen Mining Co. v. Arizona Board*, 206 U. S. 474; *Mass. Mutual Life Ins. Co. v. United States*, 288 U. S. 269; *Johnson v. Manhattan Ry. Co.*, 289 U. S. 479.

Furthermore, without reference to the action of the Bureau of Internal Revenue and the *Foster* referee, if Congress had construed the Communist Control Act as having already terminated the liability of petitioners to taxation as employers, it would not have amended the Insurance Contributions Act in a manner which will exclude them from such taxation only in the event that they are finally ordered to register as Communist-action organizations. Cf. *F. H. A. v. The Darlington, Inc.*, 358 U. S. 84, 90.

The interpretation of section 3 of the Communist Control Act by the court below is therefore contrary to that of Congress.

⁴⁰ See *Communist Party v. Subversive Activities Control Board*, *supra*.

II. Section 3 of the Communist Control Act is unconstitutional on its face and as applied below.

A. Section 3 violates the due process clause of the Fifth Amendment.

1. *Substantive due process.*

Due process requires that governmental regulation "shall have a real and substantial relation to the object sought to be attained." *Nebbia v. New York*, 291 U. S. 502, 525. Hence, "legislation not reasonably restricted to the evil with which it is said to deal" violates due process. *Butler v. Michigan*, 352 U. S. 380, 383.

The evil with which the Communist Control Act purports to deal is stated in section 2. That section declares that the Communist Party is "an instrumentality of a conspiracy to overthrow the Government of the United States," carries out policies "secretly prescribed for it by the foreign leader of the world Communist Movement," acts "as the agency of a hostile foreign power," and constitutes "a clear, present and continuing danger to the security of the United States." The evil, therefore, consists in the threat to the national security from these alleged activities of the Communist Party.

Section 3, however, is not restricted to the prohibition or control of these or other activities of the Communist Party which threaten the national security. As construed and applied below, the section deprives petitioners of all of their rights, including the right to engage, through employees or otherwise, in lawful and peaceable conduct which cannot endanger the nation even remotely. Accordingly, the Act violates the due process principle stated above. It would "burn the house to roast the pig." *Butler v. Michigan*, *supra*, at 383.

2. *Procedural due process.*

The court below held that section 3 does not violate due process in terminating petitioners' rights without a hearing. The prevailing opinion states (R. 38-49), "We see no denial of due process in the deprivation of [petitioners] of their status [as employers] without a hearing" because the recitals of petitioners' alleged misdeeds in section 2 of the Act "are so well established and known that recognition of them without further proof is a right and duty."

The holding below contravenes the decisions of this Court. The Fifth Amendment prohibits Congress from depriving an organization of liberty or property without according it a hearing on the charges against it which are relied upon to support the deprivation. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123. "This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society" (*ibid.* at 168, concurring opinion). Accordingly, the legislature may not substitute its own finding of fact for proof at a hearing of any fact required to support the charges. *McFarland v. American Sugar Refining Co.*, 241 U. S. 79; *Manley v. Georgia*, 279 U. S. 1; *Tot v. United States*, 319 U. S. 463.

The Communist Control Act violates this principle. The right of petitioners to be employers, like the other rights of which section 3 deprives them, is a form of their liberty and property protected by due process. *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, and the decisions of the Court cited *supra*, p. 17. The justification for the deprivation, as stated in section 2, is that petitioners are members of a criminal conspiracy, controlled by a hostile foreign power, to overthrow our government. But the Act accords petitioners no hearing on this charge. Instead, section 2 finds that the charge is true, and section 3 deprives petitioners

of their liberty and property solely on the basis of the legislative fiat. "[G]overnment in this country cannot by edict condemn or place beyond the pale." *Joint Anti-Fascist Refugee Committee v. McGrath*, *supra*, at 178 (concurring opinion). Yet that is precisely what the Communist Control Act attempts to do. The denial of due process could not be more flagrant.

B. Section 3 is a bill of attainder.

The Communist Control Act has all the characteristics of the classical form of bill of attainder described in *Cummings v. Missouri*, 4 Wall (71 U. S.) 277, 323:

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

" * * * In these cases, the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces on the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs adduced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense. * * *

"These bills are generally directed against individuals by name * * *."

The Communist Control Act is directed against the Communist Party by name. Section 2 pronounces the organization guilty of membership in a foreign controlled seditious conspiracy and declares that it should be outlawed. Section 3 terminates its rights, privileges and immunities.

On its face and as applied, section 3 imposes punishment. The deprivation of rights which it decrees is based solely on the criminal conduct of which section 2 finds the Communist Party to be guilty. The deprivation is both absolute and permanent. No future conduct of petitioners, no matter how exemplary, will restore the rights which section

3 denies them. Section 3, therefore, imposes punishment because "nothing that those persons proscribed by its terms could ever do would change the result." *American Communications Association v. Douds*, 339 U. S. 382, 414. See also, *Cummings v. Missouri*, *supra*, and *United States v. Lovett*, 328 U. S. 303.

Furthermore, since section 3 as construed below deprives petitioners of *all* their rights, Congress was not concerned with any particular activity or status of the Communist Party. Instead, the statute was "evidently aimed at the person or classes of persons disqualified." This is one of the indicia of punishment. *Flemming v. Nestor*, 363 U. S. 603, 614; *Cummings v. Missouri*, *supra*.

United States v. Lovett, *supra*, at 316, held that a statute barring named persons from federal employment imposed "punishment, and of a most severe type" and therefore constituted a bill of attainder. If Congress may not, by legislative fiat, deprive named persons of the right to be employees, it may not deprive them of the cognate right to be employers. Accordingly, the *Lovett* case is controlling here.⁴¹

C. Section 3 is an *ex post facto* law.

"By an *ex post facto* law is meant one which imposes punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." *Cummings v. Missouri*, *supra*, at 325-26, quoting Chief Justice Marshall.

As we have just shown, the Communist Control Act imposes punishment on petitioners for their alleged partici-

⁴¹ The case against the Communist Control Act is even stronger than that against the statute invalidated in *Lovett*. For the latter contained no express declaration of guilt. See 328 U. S. at 322-23 (concurring opinion).

pation in a seditious conspiracy. While such conspiracies were previously punishable by fine and imprisonment (18 U. S. C. 2384, 2385), section 3 imposes additional punishment in the form of a deprivation of rights. Moreover, unlike 18 U. S. C. 2384 and 2385 which require a judicial trial for conviction and punishment of the offense, section 3 imposes punishment by legislative fiat. Accordingly, the Communist Control Act is an *ex post facto* law as defined above. And see *Cummings v. Missouri, supra*, at 325-330.

D. Section 3 is not within the legislative power of Congress.

We have shown (*supra*, pp. 19-20) that the court below construed section 3 to deprive petitioner of rights granted by and dependent solely upon state law and that, so construed, the legislation is not within the competence of Congress and violates the Tenth Amendment.

III. The action of respondent in refusing to accept unemployment insurance taxes from petitioners and in suspending them as contributing employers under the New York Unemployment Insurance Law denied them due process of law and the equal protection of the laws in violation of the Fourteenth Amendment.

If the judgment below had been rested solely on a construction and application of the Communist Control Act, it would, of course, have presented no question under the Fourteenth Amendment. The prevailing opinion, however, seems at some points to hold that petitioners' status as contributing employers was terminated, not by section 3 of the Communist Control Act, but by action on the part of New York. Thus, the opinion states (R. 38):

"The Appellate Division recognized in its opinion that the State might by appropriate steps prevent the Communist Parties 'from engaging in any activity or existence.' We think that the State of New York has already done so. The Attorney General, its highest law officer, argues to us on this appeal that

the unemployment insurance officers acted validly in denying further recognition to the Communist Parties."

The prevailing opinion's reliance on state action also appears from the holding (R. 37, 39) that although Albertson's employment by the National Party postdated the Communist Control Act, he was nevertheless entitled to unemployment benefits because his employment occurred prior to the action of the Industrial Commissioner suspending the National Party as a contributing employer.

Furthermore, the amended remittitur (R. 48, 49) states that the court passed upon the question "whether the action of appellant as Industrial Commissioner in suspending the registrations of [petitioners] as employers under the Unemployment Insurance Law denied them due process of law or the equal protection of the laws in violation of the Fourteenth Amendment", and held "that the action of the Industrial Commissioner in no way violated or deprived respondents of their constitutional rights."

If, as the prevailing opinion says (R. 38), the action of the Industrial Commissioner was taken in implementation of "appropriate steps" by New York to "prevent the Communist Parties 'from engaging in any activity or existence'", then it is those steps rather than the Communist Control Act which must be looked to in determining whether the Commissioner's action was justified. The opinion does not identify the "appropriate steps" to which it refers. None were taken by the state legislature, and no state statute is cited in support of the action of the Industrial Commissioner.

The Industrial Commissioner's initial determinations against petitioners (R. 14, 17) state that they were made pursuant to the opinion of New York's Attorney General (App. B, *infra*). Again, at the hearing before the referee, the Industrial Commissioner stated that he was relying exclusively upon the Attorney General's opinion as the

justification for his action (R. 20, 23-24). This opinion constitutes the only "appropriate steps" taken by New York. The opinion finds (*infra*, pp. 48-49) that "the Communist Party is a conspiracy against the Government of the United States and of this State" and concludes that "it would be an anomaly in law, not to say amoral and against public policy, for the Communist Party and its employees to be permitted to enjoy the advantages and benefits of this public insurance program."

It was pursuant to this opinion that the action of the Industrial Commissioner, if viewed as state action, was taken. His action deprived petitioners of liberty and property by tripling their unemployment insurance taxes and handicapping them in securing and retaining employees. These deprivations denied petitioners due process and the equal protection of the laws in violation of the Fourteenth Amendment.

A. The ruling of the Attorney General was based on his statement that the Communist Party is a conspiracy against the government. However, many New York employers have not only been suspected or accused but, unlike petitioners, have been convicted of criminal conspiracy and other crimes in the conduct of their affairs, including violations of the anti-trust laws, fraud and obscenity laws, fair rent laws and the like. Yet, such convicted employers have never been excluded from coverage under the Unemployment Insurance Law, and they and their employees continue to enjoy its benefits.

The Attorney General's opinion cites cases in which the New York Courts have held that workmen's compensation will not be paid to an employee for injuries sustained in the course of employment which is illegal (*infra*, p. 48). The principle of these cases, as the court below pointed out (R. 36), has no application here. It would not exclude petitioners from taxation, but would merely bar a particular applicant from receiving unemploy-

ment benefits upon a showing that his employment by one of the petitioners was for an illegal purpose.⁴²

Neither in his written opinion nor as counsel for the Industrial Commissioner in this litigation can the Attorney General cite any instance in which an employer has been excepted from coverage under one of the state's social insurance laws even after conviction for conducting his affairs in violation of the criminal laws. The action of the Industrial Commissioner which singles out petitioners for exclusion from coverage was therefore arbitrary as well as discriminatory. Accordingly, his action denied petitioners both due process and equal protection. *Konigsberg v. State Bar*, 353 U. S. 252, 262.

B. The action of the Industrial Commissioner violates the due process principle applied in *Sweezy v. New Hampshire*, 354 U. S. 234, 254-255. There, a contempt conviction for refusal to answer interrogations by the state attorney general into constitutionally protected subject matters was held to violate due process because the legislation establishing the attorney general as an investigating committee did not authorize him to secure the information which the interrogations sought. The Court stated (at 254), "No one would deny that the infringement of constitutional rights of individuals would violate the guarantee of due process where no state interest underlies the state action." It held (*ibid*) that "an equivalent situation is presented in this case."

"An equivalent situation" is likewise presented here. The state legislature enacted a comprehensive Unemployment Insurance Law which it has regularly reviewed and

⁴² Respondent states that petitioners "are constitutionally incapable of an innocent or legal act." Brief in Opposition to Petition for Certiorari, pp. 8, 20. This *ipse dixit* outrages common sense, flies in the face of the evidence in this case establishing that Albertson's employment was innocent (R. 21) and is contrary to the findings of both of the courts below (R. 34-35, 36-37).

amended.⁴³ Although the legislature thus had frequent occasion to do so, it never authorized the Industrial Commissioner to take the action he did or gave other indication that the exclusion of petitioners from unemployment insurance taxation was in the interest of the state. Under these circumstances, as in *Sweezy*, it does not appear that a "state interest underlies the state action." Since here, as there, the state action affected rights protected by due process, it follows, as in *Sweezy* (at 255), that the action "was not in accord with the due process requirements of the Fourteenth Amendment."

C. Although the basis for the action of the Industrial Commissioner was the Attorney General's charge that the Communist Party is a conspiracy against the government, there was no hearing on or proof of the charge. Accordingly, the Industrial Commissioner's action, viewed as state action, violates the due process clause of the Fourteenth Amendment for the reasons stated *supra*, pp. 30-31 in demonstrating that the Communist Control Act violates the Fifth Amendment.

Respondent argues that petitioners were not denied a hearing on the Attorney General's charges but could have offered evidence to disprove them at the hearing before the referee. (Brief in Opposition to Petition for Certiorari, pp. 19-20.) The argument is fallacious for two reasons.

First, the court below held (R. 38-39) that the "facts" with reference to petitioners' character as criminal conspirators "are so well established and known that recognition of them without further proof is a right and duty." It was obviously not open to petitioners to disprove charges which the highest court of New York holds that it is the duty of the state authorities to accept as proved.

⁴³ *E.g.*, at its 1955 and again at its 1956 sessions, shortly before the opinion of the Attorney General and the ruling of the Industrial Commissioner.

Second, if it were true as a matter of New York Law, that the opinion of the Attorney General made out only a *prima facie* case of the truth of the charges against petitioners, an opportunity to disprove them at the referee's hearing would not satisfy the requirements of due process. *McFarland v. American Sugar Refining Co., supra; Speiser v. Randall*, 357 U. S. 513.

D. The action of the Industrial Commissioner terminated petitioners' status as contributing employers with respect to all of their employees, regardless of the character of the employment. Hence, even assuming a discernible state interest in excluding petitioners from unemployment insurance taxation with respect to employees engaged in illegal activity, the action taken would still violate due process because indiscriminate. See *supra*, p. 29.⁴⁴

Conclusion .

The judgment below should be reversed.

Respectfully submitted,

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⁴⁴ The action of the Industrial Commissioner, viewed as state action, also constitutes a bill of attainder in violation of Art. I, Sec. 1, Cl. 1 of the Constitution. This is true for the reason stated *supra*, pp. 31-32 and in *Joint Anti-Fascist Refugee Committee v. McGrath*, *supra*, at 144 (concurring opinion).

Appendix A—Statutes Involved

The Communist Control Act of 1954, 50 U. S. C. 841-44, provides in part as follows:

FINDINGS OF FACT

SEC. 2. The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present con-

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stitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear, present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed.

PROSCRIBED ORGANIZATIONS

SEC. 3. The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof; or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are hereby terminated: *Provided, however,* That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended.

SEC. 4. Whoever knowingly and willfully becomes or remains a member of (1) the Communist Party, or (2) any other organization having for one of its purposes or objectives the establishment, control, conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political subdivision thereof,

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by the use of force or violence, with knowledge of the purpose or objective of such organization shall be subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a "Communist-action" organization.

SEC. 5. In determining membership or participation in the Communist Party, or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented, as to whether the accused person:

(5) Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the organization;

(6) Has conferred with officers or other members of the organization in behalf of any plan or enterprise of the organization;

(7) Has been accepted to his knowledge as an officer or member of the organization or as one to be called upon for services by other officers or members of the organization;

(11) Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the organization or to anyone else in behalf of the objectives of the organization;

The New York Unemployment Insurance Law, Labor Law, secs. 500-643, provides in part as follows:

SEC. 511. Employment.—1. General definition. "Employment" means any service under any contract of employment for hire, express or implied, written or oral.

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SEC. 512. Employer.—“Employer” includes the State of New York and any person, partnership, firm, association, public or private, domestic or foreign corporation, the legal representative of a deceased person, or the receiver, trustee or successor of a person, partnership, firm, association, public or private, domestic or foreign corporation.

SEC. 517. Remuneration.—1. Inclusions. “Remuneration” means every form of compensation for employment paid by an employer to his employee;

SEC. 518. Wages.—Limitation. “Wages” means all remuneration paid, except that such term does not include remuneration paid to an employee by an employer after three thousand dollars have been paid to such employee by such employer with respect to employment during any calendar year.

SEC. 570. Payment of contributions.—1 Rate. Each employer liable under this article shall pay contributions on all wages paid by him * * * Contributions shall be paid in an amount equal to two and seven-tenths per centum of such wages, except as otherwise provided by the provisions of sections five hundred seventy-seven and five hundred eighty-one of this article.*

The Federal Unemployment Tax Act, 26 U. S. C. 3301-3308, provides in part as follows:

Sec. 3301. Rate of tax

There is hereby imposed on every employer (as defined in section 3306(a)) for the calendar year 1955 and for each

* Sec. 577 provides for increasing the tax rate when the unemployment insurance fund becomes depleted. Sec. 581 prescribes the formula for determining the tax rate of the individual taxpayer in accordance with his experience rating.

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calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 percent * of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)) after December 31, 1938.

Sec. 3302. Credits against tax

(a) Contributions to state unemployment funds.—

(1) The taxpayer may, to the extent provided in this subsection and subsection (c), credit against the tax imposed by section 3301 the amount of contributions paid by him into an unemployment fund maintained during the taxable year under the unemployment compensation law of a State which is certified for the taxable year as provided in section 3304.

• • • • •

(b) Additional credit.—In addition to the credit allowed under subsection (a), a taxpayer may credit against the tax imposed by section 3301 for any taxable year an amount, with respect to the unemployment compensation law of each State certified for the taxable year as provided in section 3303 ** (or with respect to any provisions thereof so certified), equal to the amount, if any, by which the contributions required to be paid by him with respect to the taxable year were less than the contributions such taxpayer would have been required to pay if throughout the taxable year he had been subject under such State law to the highest rate applied thereunder in the taxable year to any persons having individuals in his employ, or to a rate of 2.7 percent, whichever rate is lower.

* Increased to 3.1 percent for 1961 and thereafter by amendment of September 13, 1960, 74 Stat. 980.

** Provides for the certification of state experience rating provisions which meet specified standards.

*Appendix A—Statutes Involved***(c) Limit on total credits.—**

(1) The total credits allowed to a taxpayer under this section shall not exceed 90 percent of the tax against which such credits are allowable.

• • •

Sec. 3306. Definitions

(a) **Employer.**—For the purposes of this chapter, the term “employer” does not include any person unless on each of some 20 days during the taxable year, each day being in a different calendar week, the total number of individuals who were employed by him in employment for some portion of the day (whether or not at the same moment of time) was 4 or more.

(b) **Wages.**—For the purpose of this chapter, the term “wages” means all remuneration for employment * * *.

(c) **Employment.**—For the purposes of this chapter, the term “employment” means * * * any service, of whatever nature, performed after 1954 by an employee for the person employing him * * *.

(i) **Employee.**—For the purposes of this chapter, the term “employee” includes an officer of a corporation, but such term does not include—

(1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or

(2) any individual (except an officer of a corporation) who is not an employee under such common law rules.

• • •

**Appendix B—Opinion of the New York
Attorney General**

January 29, 1957

Hon. Isador Lubin
Industrial Commissioner
The Governor Alfred E. Smith
State Office Building
Albany 1, New York

Dear Commissioner Lubin:

Under date of August 22, 1956 you asked the opinion of former Attorney General Javits as to whether employment with the Communist Party of New York State or the Communist Party of the United States may form a basis for determining eligibility to unemployment insurance benefits under the New York State Unemployment Insurance Law; and whether compensation in such employment is subject to the payment of unemployment contributions under that law.

My answer to both questions is in the negative.

The Unemployment Insurance program operates under the auspices of, and is supervised and administered by, the Government of the United States and of this State. It appears to me implicit that the character and activities of the Communist Party foreclose it and its employees from the rights and privileges of participation in that program.

The nature of the Communist Party, its activities and objectives, have been characterized by the Congress of the United States in the Internal Security Act of 1950 and the Communist Control Act of 1954. To quote from the findings and declarations of fact in Section 2 of the latter Act (50 U. S. C., § 841):

“The Congress finds and declares that the Communist Party of the United States, although pur-

Appendix B—Opinion of the New York Attorney General

portedly a political body, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States.”

The section concludes:

“ * * * the Communist Party should be outlawed.”

Section 3 of the same Act (50 U. S. C., § 842) provides that the Communist Party, its successors, and subsidiary organizations

“are not entitled to any of the rights, privileges and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated.”

I draw your attention also to the “Congressional Findings of Necessity” in the Internal Security Act of 1950 (Section 2; 50 U. S. C. A., § 781).

In this State, the Legislature has, in the Feinberg Law (L. 1941, ch. 360, §1) and in the Security Risk Law (L. 1951, ch. 233, § 1; Unconsolidated Laws, p. 1101), made findings of similar import in respect to the Communist Party.

The Court of Appeals of this State has written of the nature of the Communist Party (*Matter of Daniman v. Bd. of Education of the City of New York*; 306 N. Y. 532, 540):

“In this court we are all agreed that the Communist Party is a continuing conspiracy against our Government. (See *Communications Assn. v. Douds*, 339 U. S. 382, 425 et seq.; *Dennis v. United States*, 341

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U. S. 494, 564; Preamble to the Feinberg Law (L. 1949, ch. 360, § 1.)”

The Supreme Court of the United States has voiced like opinions (*Dennis v. United States*, 341 U. S. 499; *American Communications Assn. v. Douds*, 339 U. S. 382) and held members of the Communist Party subject to being proscribed from rights and privileges such as that of being a teacher in the public schools of this state (*Adler v. Bd. of Education*, 342 U. S. 485).

The Subversive Activities Control Act, to which I have already referred, was upheld as constitutional by the United States Court of Appeals for the District of Columbia Circuit, which held that the Communist Party of the United States was required to register thereunder as a Communist-action organization (*Communist Party of U. S. v. Subversive Securities Control Board*, 223 F. (2d) 531). The Court said at one point:

“ * * * we perceive no reason why the presently existing government in this country should not * * * withdraw from its (Communist organization's) members protection and privileges otherwise afforded by that government.”

As to the nature of the Communist Party in this country, see some of the observations of Circuit Judge Prettyman in the course of this opinion, for example, pages 565 to 576. The Supreme Court of the United States, on appeal thereto, remanded the case to the Board without reaching the question of constitutionality, because the testimony of three witnesses before the Board was contended to be possibly perjurious (351 U. S. 115).

The Communist Party has thus been declared by the highest Court of this State, by the Supreme Court of the United States, by the Congress of the United States, and by the Legislature of this State, to be a conspiracy against the government of the United States and of this State, and

Appendix B—Opinion of the New York Attorney General

as an organization, and as to members thereof, not entitled to protections and privileges otherwise offered by government.

Returning then to the question here before us, I find that your department in the past, in administering the Unemployment Insurance Law, and the Courts, in another area of social insurance, Workmen's Compensation, have denied these rights in the case of employees of employers engaged in enterprises which are illegal, or declared by the Legislature to be against public policy. You have enclosed in your letter two determinations (one in 1951 and one in 1952) by your department to such effect. One of these decisions quotes from an earlier one as follows:

"The Unemployment Insurance Law does not confer benefits upon an employee in a business which has been declared by the legislature to be against public policy and the conduct of which involves a violation of the criminal law."

In a case arising out of a Workmen's Compensation claim for injury resulting in death to a bartender employed in a saloon when prohibition was in effect, the Appellate Division (3rd Dept.) dismissing the claim, declared:

"This Court will not lend its aid to the enforcement of any claim growing out of a contract of employment one of the purposes of which is the violation of a law of the land * * *".

For a like result, see also *Swihura v. Horowitz*, 215 App. Div. 740, aff'd 242 N. Y. 523.

It is my opinion that in light of the repeatedly declared views by the Courts and by the federal and this State's legislative bodies, that the Communist Party is a conspiracy against the Government of the United States and of this State, it would be an anomaly in law, not to say

Appendix B—Opinion of the New York Attorney General

amoral and against public policy, for the Communist Party and its employees to be permitted to enjoy the advantages and benefits of this public insurance program. To make such exclusion is, as I have set forth *supra*, matter of precedent. In so far as *scienter* on the part of the employee is concerned, it is certainly a fair inference that anyone now claiming benefits based on employment by the Communist Party during the past year (the base year for one now making unemployment insurance claims) had full knowledge of the nature, activities and objectives of the Communist Party.

I conclude, accordingly, that unemployment insurance contributions should not be received, pursuant to the New York State Unemployment Insurance Law, from the Communist Party of New York State or the Communist Party of the United States, and that employment by the Communist Party of New York State or the Communist Party of the United States should not be credited as a basis for determining unemployment insurance benefits under the statute by ruling of your department. The ultimate decision, of course, is in the courts, to which one considering himself aggrieved by your determination would have recourse.

Very truly yours,

LOUIS J. LEFKOWITZ,
Attorney General.

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JAMES S. BARNES, Clerk

IN THE
Supreme Court of the United States

No. 495—October Term, 1960

COMMUNIST PARTY, U. S. A. and COMMUNIST
PARTY OF NEW YORK STATE,

Petitioners,

v.

MARTIN P. CATHERWOOD, as Industrial Commissioner,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

RESPONDENTS' BRIEF

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IN THE
Supreme Court of the United States

No. 495—October Term, 1960

**COMMUNIST PARTY, U. S. A. and COMMUNIST
PARTY OF NEW YORK STATE,**

Petitioners,

v.

MARTIN P. CATHERWOOD, as Industrial Commissioner,
Respondent.

RESPONDENT'S BRIEF

Opinions Below

Based upon an official opinion of the Attorney General of the State of New York (Appendix B to Petitioners' Brief, pp. 45-49), the respondent's predecessor in office suspended the registrations of the Communist Party, U. S. A. (14-15)¹ and the Communist Party of New York State (17-18) as employers under the New York State Unemployment Insurance Law (N. Y. Labor Law, §§ 500 *et seq.*, [Consolidated Laws, Chap. 31, Art. 18]).²

This determination of the respondent's predecessor was sustained by the Unemployment Insurance Referee (3-14)

¹ References are to pages of the Transcript of Record.

² Suspension of registration as an employer results in the exclusion of the employer from the operation of the Unemployment Insurance Law so that it is thereby deprived of the opportunity of affording its employees the benefits of that law.

and the latter's decision was affirmed by the Unemployment Insurance Appeal Board (1-2).

The Appellate Division of the New York Supreme Court reversed the decision of the Appeal Board and overruled the suspension of the petitioners' registrations as contributing employers. Its opinion is reported in 8 A. D. 2d 918, 187 N. Y. S. 2d 200 (33-35).

The Court of Appeals of the State of New York reversed the decision of the Appellate Division and reinstated the suspension of the registrations. Its opinion (DESMOND, C. J.) is reported in 8 N. Y. 2d 77, 168 N. E. 2d 242. Judge FULD wrote a dissenting opinion; Judge VAN VOORHIS wrote an opinion concurring in part.³

Jurisdiction

The grounds on which the jurisdiction of the Court is invoked are set forth in Petitioners' Brief (pp. 1-2).

Questions Presented

The questions presented are as set forth in Petitioners' Brief (p. 2), except that the order amending the remittitur provided that the question of violation of the First Amendment was also involved.

Constitution, Statutes, Reports, etc., Involved

Involved in this case are:

U. S. Constitution:

Preamble; Art. I § 4; Art. 1 § 8 Cl. 1; Art. II § 1; Art. IV §§ 2, 4; Amendments I, V, X and XIV.

³ For all of the opinions, see Transcript of Record, pp. 36-45.

STATUTES:**Federal:**

Communist Control Act of 1954 (50 U. S. Code §§ 841 *et seq.*, 68 Stat. 775);⁴

Subversive Activities Control Act of 1950 (50 U. S. Code § 781, 64 Stat. 987).⁵

State:

Feinberg Law (L. 1949, ch. 360, § 1);⁶

Labor Law §§ 511, 571.

Other Documents:

Congressional Record (August 16, 1954; p. 13837; August 17, 1954, pp. 14079, 14081, 14082, 14088);

Report of U. S. House of Representatives dated August 22, 1950 (House Rep. No. 2980, U. S. Code Cong. and Admin. News, 1950, p. 3886);⁷

New York Attorney General's Opinion (1957 Op. Att'y. Gen. 239).⁸

Statement

The respondent's predecessor suspended the petitioners' registrations as employers under the New York Unemployment Insurance Law (14-15, 17-18). Upon the administrative review which ensued this determination was sustained under the provisions of the Communist Control Act of 1954 (5-6, 13-14). In establishing a *prima facie* case in the review proceeding, the respondent* relied on the doctrines

⁴ See Appendix A, *infra*, pp. 85-89.

⁵ See Appendix A, *infra*, pp. 82-85.

⁶ See Appendix A, *infra*, pp. 89-90.

⁷ See Appendix A, *infra*, pp. 90-91.

⁸ See Appendix B to Petitioners' Brief (pp. 45-49).

of judicial notice and judicial regard for legislative findings as to the character of the Communist Party as a criminal conspiracy for the overthrow of the Government by force and violence (3, 4-5, 38-39). The petitioners were free to submit such evidence as they saw fit to controvert this fact, but failed to avail themselves of the opportunity (23).

Summary of Argument

I. The Industrial Commissioner, possessed of the power to suspend the petitioners as employers under New York's Unemployment Insurance Law,⁹ properly exercised that power.

A. Each of the petitioners constitutes a criminal conspiracy, the principal object of which is the overthrow of the Government of the United States by force and violence.

Judicial Notice

None of the parties adduced any evidence whatever, either at the hearings before the Referee or at the hearing before the Appeal Board, as to the character or capacity of the petitioners. Having failed to submit any evidence, as was their right, to controvert the fact that they were a criminal conspiracy, the petitioners are deemed to have waived any objections that they might otherwise have asserted to a determination based upon such premise.

The Commissioner, on the other hand, is in an entirely different position. It was not incumbent upon him affirma-

⁹ In the performance of his statutory duty to determine the amount of contributions (i.e., taxes) due from an employer (Labor Law § 511), the Industrial Commissioner has been held to have the power to determine who is an employer within the meaning of the statute (*Matter of Electrolux Corp.*, 286 N. Y. 390, 397, 36 N. E. 2d 633 [1941]).

tively to adduce evidence on that issue. He could rely completely upon the fact, that judicial notice would be taken at all stages of the proceeding of the fact, that the petitioners constituted a criminal conspiracy. (*Barenblatt v. United States*, 360 U. S. 109, 127-129 [1959]; *Dennis v. United States*, 341 U. S. 494, 547 [1950]; *American Communications Association, C. I. O. v. Douds*, 339 U. S. 382, 424-433 [1950; concurring opinion of Mr. Justice JACKSON]; *Martinez v. Neelly*, 197 F. 2d 462, 465 [7th Cir., 1952], *affd.* 344 U. S. 916 [1953]; *Carlson v. Landon*, 187 F. 2d 991, 997 [9th Cir., 1951], *affd.* 342 U. S. 524 [1952]; *National Maritime Union of America v. Herzog*, 78 F. Supp. 146, 170 [Dist. of Col., 1948], *affd.* 334 U. S. 854 [1948]; *In re McKay*, 71 F. Supp. 397, 399 [N. D. Ind., 1947]; *Matter of Lerner v. Casey*, 2 N. Y. 2d 355, 372, 141 N. E. 2d 533 [1957], *affd.* 357 U. S. 468 [1958]; *Appeal of Albert*, 372 Pa. St. 13, 19-22, 92 A. 2d 663 [1952]; *Powell v. Unemployment Compensation Board of Review*, 146 Pa. Super. 147, 150-151, 22 A. 2d 43 [1941]).

The petitioners have failed to distinguish between the crime itself and the perpetrator of the crime.¹⁰ The Courts

¹⁰ It is conceded that in denaturalization proceedings (*Nowak v. United States*, 356 U. S. 669 [1958]), disciplinary proceedings against a member of the Civil Service (*Adler v. Board of Education*, 342 U. S. 485 [1952]), proceedings to determine whether an individual possesses the requisite character to merit admission to the bar (*Schwartz v. Board of Bar Examiners*, 353 U. S. 232 [1957]), criminal proceedings against an individual (*Yates v. United States*, 354 U. S. 298 [1957]), or any other case in which it is sought to establish that an individual is guilty of criminal advocacy of overthrow of the government by force and violence, it is necessary that such fact must be affirmatively established by evidence other than that which may be considered under the doctrine of judicial notice. However, these cases are authority simply for the proposition that the doctrine of judicial notice of the character of the Party cannot be employed as a substitute for evidence in any case involving the requirement of proof that a particular member of the Party participated in any illegal activity as a member.

need no evidence to substantiate the fact that certain acts, by definition, constitute a crime. Thus, the Communist Party, U. S. A., and its subordinates and affiliates on other geographical levels, *in and of themselves* constitute a criminal conspiracy, and no evidence of such fact needs to be adduced. They are a crime, just as burglary and arson, murder and treason are crimes. We are not dealing here with any particular individual who, as a member of the Party, or otherwise, commits "communism".

Legislative Findings

Closely akin to the establishment of the character and nature of the Communist Party under the doctrine of judicial notice is the fact that great weight must be accorded to the legislative findings of Congress and of the legislatures of New York and other states with respect to the character and nature of the Communist Party. (See Subversive Activities Control Act of 1950, 50 U. S. Code § 781, 64 Stat. 987, Appendix A, *infra*, pp. 82-85; Communist Control Act of 1954, 50 U. S. Code § 841, 68 Stat. 775, Appendix A, *infra* pp. 85-86; Feinberg Law, N. Y. L. 1949, ch. 360, § 1, Appendix A, *infra*, pp. 89-90; Report of U. S. House of Representatives dated August 22, 1950 [House Report No. 2980], U. S. Code Cong. and Admin. News 1950, p. 3886, Appendix A, *infra*, pp. 90-91).¹¹

¹¹ See also: *Galvan v. Press*, 347 U. S. 522, 529 (1953); *American Communications Association, C. I. O. v. Douds*, 339 U. S. 382, 391 (1950); *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937); *Block v. Hirsch*, 256 U. S. 135, 154 (1921); *Communist Party of U. S. v. Subversive Activities Control Board*, 223 F. 2d 531, 565-566 (App. D. C., 1954), *revd.* and *re-manded* on another ground, 351 U. S. 115 (1956).

Inherent Illegality

It is apparent from the foregoing that in the absence of evidence to controvert the fact, as is the situation in the case at bar, both the doctrines of judicial notice and the rule that legislative findings must be accorded great weight, establish the fact that the petitioners herein constitute a criminal conspiracy to overthrow the Government of the United States and the Government of the State by force and violence. As such, they are illegal organizations whose illegality permeates every facet of their operations. The illegality is based on the concept of being both constitutionally and morally wrong. In other words, it is *malum in se*. They are constitutionally incapable of an innocent or legal act (*Sprott v. United States*, 20 Wall. 459, 464-465 [1874]).

B. Any rights, privileges and immunities which the petitioners may have had, including the right to be classified as an employer within the meaning of the Unemployment Insurance Law, were terminated by the Communist Control Act of 1954.

Termination of Rights, Privileges and Immunities

Both of the petitioners are proscribed under Section 3 of the Act (50 U. S. Code § 842, Appendix A, *infra*, p. 87)—the Communist Party of the United States by name, the Communist Party of New York State as one of the latter's "subsidiary organizations". Furthermore, Section 4(b) of the Act (50 U. S. Code § 843[b], Appendix A, *infra*, pp. 87-88), which is *in pari materia* with Section 3, defines the term "Communist Party" as "the organization now known as the Communist Party of the United States of America, the Communist Party of any State or subdivision thereof,

and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name thereof."

The petitioners distinguish between the phrase at the beginning of Section 3, "the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein," (Appendix A, *infra*, p. 87) and the two phrases at the end of the section dealing with non-entitlement to any rights, privileges, and immunities of bodies created under the jurisdiction "of the laws of the United States or any political subdivision thereof", and termination of rights granted by reason "of the laws of the United States or any political subdivision thereof." The petitioners assert that the wording of the latter two clauses demonstrates Congressional recognition of the distinction between "a political subdivision" and a "State". Petitioners state that a subdivision is "a part of a thing made by subdividing" and that "the states, of course, were not 'made by subdividing' the nation, but themselves 'made' the United States" (Brief, page 19). In other words, as they argued in the Court below, the phrase "political subdivision", as used in the last clause of the section, is a short-hand reference to the federal territories and possessions and the District of Columbia, all of which are "political subdivisions" of the United States.

In the first place it must be observed that even in the absence of other factors which would aid in the process of statutory interpretation, the mere absence of the word "State" in a federal statute does not exclude applicability of the statute to the States (*Case v. Bowles*, 327 U. S. 92, 99 [1946]).

Secondly, it was quite clearly the intent of Congress to include in the last two phrases, in short-hand form, the same political entities as were included in detail in the first phrase. This is apparent from the context of the latter two phrases, in which the political entities referred to are entities having law-making powers. Certainly, the District of Columbia and many of the federal possessions do not have independent or sovereign, law-making powers under which corporations may be formed and under which statutory rights, privileges and immunities may arise. Laws for the District and such possessions are enacted directly by Congress. A State, on the other hand, has independent, sovereign, law-making powers in the respects stated.

Moreover, the petitioners' analysis, confining the meaning of "political subdivision" in the last clause to the District and federal possessions, is illogical because these, too, were specifically referred to in the first clause. The more logical conclusion would seem to be that in the first clause the words "political subdivision" refer to *local* governmental units within the States and Territories, while the same words, as used in the last clause, which actually terminates the rights of the Communist Party, include the States.¹²

¹² This interpretation is, furthermore, in accord with the congressional intent, as the intent is reflected in the legislative record (100 Cong. Rec. 14079, 14081 [daily ed. August 17, 1954]; *id.*, at 13837 [daily ed. August 16, 1954]; *id.*, at 14082 [daily ed. August 17, 1954]). In the cited pages of the Congressional Record it was stated that the Act would deny the Party a place on the ballot. Since the right to appear on the ballot, whether for State or Federal office, depends on State law (U. S. Const., Art. I, § 4 and Art. II, § 1; *United States v. Gradwell*, 243 U. S. 476 [1917]; 18 Am. Jur., tit. *Elections* § 9 [1938]), it must necessarily have been the intention of Congress that state-granted rights be included within the proscription of section 3 of the Act.

According to the argument of the petitioners the Communist Control Act does apply to Alaska and Hawaii because at the time of its enactment they were territories of the United States. Do the petitioners now claim that since these territories have attained statehood the Act no longer applies to them? And if it is admitted that the Act continues to apply to them, what happens to the principle that all States are admitted to the Union upon an equal footing?

It seems obvious, also, from the context of the section, as a whole, that the *laws*, the benefit of which the petitioners have lost, are necessarily the laws of the *governments*, federal, state and territorial which the petitioners seek to overthrow. The fine splitting of hairs, the reliance upon whether the Nation was "made" from the States or *vice versa*, cannot obscure the intent so clearly expressed in the statute.

Natural or Inherent Rights

Petitioners argue that the right of natural persons to employ others is a natural or inherent right and that such rights are not affected by the Communist Control Act (Sec. 3) which terminates only those rights "which have heretofore been *granted* * * * by reason of the laws of the United States or any political subdivision thereof." (Emphasis added.)

Literally, however, this provision applies to *all* "rights, privileges, and immunities" because the "laws of the United States or any political subdivision thereof" include the common law as well as statute law of the states and all "rights, privileges, and immunities" are "granted" by such laws since these terms describe the extent to which

particular individual or group claims or interests are secured by law.¹³

In any event, the right of the petitioners, generally, to enter into contracts, or specifically, to enter into contracts wherein they employ others, is not the right or privilege which is the subject of termination in the case at bar. Here there is involved, purely and simply, the right to be an employer within the meaning of New York's Unemployment Insurance Law. That right, obviously, is the subject of statutory grant.

Effect of Continued Existence

Petitioners argue that the provisions of the Internal Security Act and Section 5 of the Communist Control Act evince a legislative intent not to terminate "the right of petitioners to have and to function through employees" (Brief, pp. 20-22). However, this argument is predicated on the obviously meaningless and stultifying assumption that Congress would destroy the petitioners at one point and recognize their continued viability at another. The fallacy in the argument is exposed when it is seen that the statute destroyed the *legal* existence of the petitioners (if, indeed, they ever had such existence), but recognized that they probably would, nevertheless, continue on an illegal basis. Control by the Government is just as essential in the one case as in the other. In any

¹³ See, for example, N. Y. Const., Art. I § 14, which provides: "Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred seventy-five, * * * shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, * * * as are repugnant to this constitution, are hereby abrogated."

event, it is unsound to argue that because the regulatory provisions of the Internal Security Act will have no scope if the activities sought to be regulated are prohibited by the Communist Control Act, the proviso in Section 3 of the latter act should be interpreted to authorize the petitioners to continue to assert, as a legal entity, the rights, privileges and immunities which have been expressly terminated.

Obligations and Duties

The respondent argues, and he has been upheld by the Court below (37), that whatever rights, privileges and immunities the petitioners may have had, were terminated by the Communist Control Act. The dissenting opinion of FULD, J., in the Court below, held (43-44), and the petitioners here urge (Brief, pp. 14-16), that the requirement to pay an unemployment insurance tax is a liability imposed upon them and not an "immunity or right" within the Act. Of course, in the very nature of the matter an *obligation or duty* to pay a tax cannot be considered a *right, privilege or immunity*. The relevant point involved herein is whether the *right to be a registered employer* was terminated by the Act. The correlative of the right to be an employer in covered employment is the obligation to pay the tax, but the latter is merely the tail which should not be permitted to wag the dog. As well might it be argued that the obligation to pay an income tax is determinative of the right to earn income, or to push the analogy to an even greater extreme, the obligation to pay an estate tax is determinative of the right to pass title by will or descent. (Cf. *Rutkin v. United States*, 343 U. S. 130, 137 [1951]; *Wainer v. United States*, 299 U. S. 92, 93 [1936]; *Angelus Building & Investment Co. v. Commission-*

er of Internal Revenue, 57 F. 2d 130, 132 [9th Cir., 1932], cert. den. 286 U. S. 562 [1931]; *State ex rel. Replogle v. Joyland Club*, 124 Mont. 122, 220 P. 2d 988, 999 [1950]; *State v. Israel*, 124 Mont. 152, 220 P. 2d 1003, 1011 [1950]; *Commonwealth ex rel. Gilmer v. Smith*, 193 Va. 1, 68 S. E. 2d 132, 136 [1951]; *Stein v. State Tax Comm.*, 266 Ky. 770, 115 S. W. 2d 443, 445 [1936]; *Eucke v. Mescall*, 272 Ky. 770, 115 S. W. 2d 358 [1938]).

It seems obvious that the essential test determining taxability is the prerequisite of coverage of the employer under the Unemployment Insurance Law; coverage cannot arise simply upon the basis of payment of the tax. It follows that although the Act does not affirmatively relieve the petitioners of a tax liability, it *destroys a status upon which the tax liability depends*.

II. Congress had the constitutional power to enact the Communist Control Act.

The Communist Control Act is founded on a much broader, much firmer, and more relevant base than control of interstate commerce. The Federal Government, through Congress, has a constitutional right to act, not only in its own behalf, but also in behalf of the several States. Congress has the power to provide for the common defense (Const., Art. I, Sec. 8, Cl. 1; see also, the Preamble to the Constitution) and is under the duty to implement the guarantee to every State of a republican form of government. (*Dunne v. United States*, 138 F. 2d 137, 140 [8th Cir., 1943], cert. den. 320 U. S. 790 [1943]; *Farmer v. Rountree*, 149 F. Supp. 327, 329 [M. D. Tenn., 1956], affd. 252 F. 2d 490, 491 [6th Cir., 1958], cert. den. 357 U. S. 906 [1958]; *United States v. Peace Information Center*, 97 F. Supp. 255, 261 [Dist. of Col., 1951]; *Oil Workers International Union v. Elliott*, 73

F. Supp. 942, 944 [N. D. Texas, 1947]; *Teget v. Lambach*, 226 Iowa 1346, 1350, 286 N. W. 522 [1939]; *Commonwealth v. Nelson*, 377 Pa. St. 58, 69, 104 A. 2d 133 [1954], *affd.* 350 U. S. 497 [1956]).

Aside from the question of constitutional capacity to enact a law such as that involved herein, it should be noted that the right so to act is without constitutional limitation, is considered political in nature, and is not judicially reviewable (*Ohio v. Akron Park District*, 281 U. S. 74, 79-80 [1930]; *Highland Farms Dairy v. Agnew*, 300 U. S. 608, 612 [1937]; *Farmer v. Rountree*, *supra*).

The Tenth Amendment (reserved power of the States) does not impose any limitations on the powers of the Federal Government (*Case v. Bowles*, 327 U. S. 92, 101-102 [1946]; *Fernandez v. Wiener*, 326 U. S. 340, 362 [1945]; *United States v. Darby*, 312 U. S. 100, 123-124 [1941]). It merely gives doctrinal body to an objection that Congress has no power to act at all in certain areas. It "states but a truism that all is retained which has not been surrendered" (*United States v. Darby*, *supra*). Thus, if Congress has power to act in a given area, no valid objection can be raised because of the fact that it thereby enters a field which ordinarily has been regulated by the States (*Case v. Bowles*, *supra*; *Bowles v. Willingham*, 321 U. S. 503, 521-523 [1944, concurring opinion of Mr. Justice RUTLEDGE]; *United States v. Darby*, *supra*, at pp. 114, 123-124; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 156 [1919]).

Federal Inaction

Federal inaction under the Act, on administrative or other levels, does not impugn the viability of the Act nor militate against its legal efficacy. The Communist Control Act is clear and unambiguous in its terms; it is not in

need of further Federal or State statutory implementation (*Salwen v. Rees*, 16 N. J. 216, 108 A. 2d 265 [1954]; *Pennsylvania v. Nelson*, 350 U. S. 497, 504 [1956]).

III. Although the petitioners, in any event, have no standing to assert any objections to the Act on constitutional grounds, it may nevertheless be clearly demonstrated that the Act is constitutional.

Bill of Attainder and Ex Post Facto Law

Since neither punishment nor retroactivity is involved, it does not constitute either a bill of attainder or an *ex post facto* law.

A bill of attainder is generally described as a legislative act which imposes punishment upon a named individual or an easily ascertainable group without a judicial trial (*United States v. Lovett*, 328 U. S. 303, 315 [1946]; *Cummings v. Missouri*, 4 Wall. 277, 323 [1867]). The *ex post facto* provision of the Constitution forbids penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment, but does not apply to legislation imposing civil disabilities (*Harisiades v. Shaughnessy*, 342 U. S. 580 [1952]).¹⁴

The deprivations provided for in the Act do not constitute punishment since the legislation does not evince a penal intent. True it is that the statute imposes certain civil disabilities, but not all imposition of disability constitutes punishment. This Court recently held that whether a statute is a bill of attainder depends upon the purpose of

¹⁴ The debates in the federal convention upon the Constitution show that the term "*ex post facto* laws" was understood in a restricted sense relating to criminal cases only (*Bugajewitz v. Adams*, 228 U. S. 585 [1913]; see also, *Carpenter v. Pennsylvania*, 17 How. 463 [1855] and *Johannessen v. United States*, 225 U. S. 225 [1912]).

the statute (*Trop v. Dulles*, 356 U. S. 86, 96 [1958]. See also *Flemming v. Nestor*, 363 U. S. 603, 613-616 [1960] and *DeVeau v. Braisted*, 363 U. S. 144, 160 [1960]). It is quite clear from the "Findings and Declarations of Fact" which are expressly set forth in the Act (50 U. S. Code § 841, 68 Stat. 775), that the purpose of Congress in enacting this legislation was to draw the fangs of this "agency of a hostile foreign power" whose existence was "a clear and present danger to the security of the United States."

Furthermore, assuming, *arguendo*, that the disqualification was based on the legislature's implicit determination of culpability, recent cases require that the proscription have retroactive application in order to constitute punishment (See *Garner v. Board of Public Works*, 341 U. S. 716 [1951]; *American Communications Association, C. I. O. v. Douds*, 339 U. S. 382, 413-414 [1950]; *Albertson v. Millard*, 106 F. Supp. 635 [E. D. Mich., 1952], revd. on another ground and remanded 345 U. S. 242 [1952]; *Huntamer v. Coe*, 40 Wash. 2d 767, 246 P. 2d 489 [1952]).

In the case at bar, too, a like result should ensue. The Act does not inflict punishment of any character, and if it be held that punishment is inflicted, it is clear that it is not imposed by reason of any past conduct. Recognizing the *continuing* criminal character of the Party, the Act provides for inability to assert in the future any rights, privileges and immunities in connection with transactions which take place subsequent to the effective date of the Act.

Due Process

Despite the proscription set forth in the Act, there is nothing in the Act which deprives the Party of substantive due process when action is brought against it to terminate a right which it claims. It is precisely that which is taking

place in the case at bar. The petitioners were afforded the opportunity at the hearings herein to present evidence in opposition to the termination of their rights. Neither the Industrial Commissioner, nor the Referee, nor the Appeal Board denied them the right to present their case. And the statute, itself, does not deny them that right.

So far as procedural due process is concerned, they received notice of the action of the Commissioner and they received notice of all proceedings to review the action of the Commissioner. They also had a full hearing.

It is submitted that there has been no violation of due process, either substantive¹⁵ or procedural. It is further submitted, however, assuming it be held that the statute does permit a denial of due process, that such denial would be proper, as consonant with a basic postulate which underlies the due process provision—movements seeking to crush freedom need not be tolerated. Mr. Chief Justice HUGHES, in *Principality of Monaco v. Mississippi*, 292 U. S. 313, 322 (1934), expressed the admonition that behind “the words of the constitutional provisions are postulates which limit and control.”

The Courts, generally, have refused so to construe the Bill of Rights as to interfere with a reasonable legislative judgment of what laws are essential to national security. This is as it should be, for without the observance of the

¹⁵ Petitioners assert (page 29 of their brief) that Section 3 is not “reasonably restricted to the evil with which it is said to deal” (citing *Butler v. Michigan*, 352 U. S. 380, 383 [1956]). But the evil at which the Act strikes is identical with the evil at which Congress struck in the Internal Security Act of 1950. We respectfully refer the Court to the treatment of this point in the respondent’s brief in this Court in *Communist Party of the United States of America v. Subversive Activities Control Board*, October Term, 1960, No. 12, pp. 93-100.

primary duty of self-preservation the civil liberties of the individual would be meaningless, since they must, under such circumstances, succumb to the totalitarian regime which must inevitably follow.

It is submitted that the Constitution should be construed in accordance with its purpose and *as one instrument*. Pre-occupation with or emphasis upon one part of the Constitution and the ignoring of another equally important part, so as to endanger national survival, constitutes an unrealistic and an improper method of applying constitutional standards and principles.

The greatest difficulty in recent years has been with respect to the situation where the right to assert infringement of civil liberties and the right of the government to resist violence seem to meet. There is required a deeper analysis of violence and non-violence and their relation to liberal democracy. In the *Dennis* and *Yates* cases, *supra*, this Court affirmed "the basic premise of our political system—that change is to be brought about by non-violent constitutional process." No government can assure a "right" of violent overthrow; the guaranty and the right are mutually abhorrent. Certain political philosophers to the contrary notwithstanding, violent revolution exists *outside* rather than *inside* the law. Therefore, since the Communist Party is a conspiracy for the violent overthrow of the government, its advocacy of such violence colors its every act and withdraws it from the protection of the Bill of Rights.

First Amendment¹⁶

The basic postulate, discussed above with respect to due process, is a limiting factor also upon the operation of the First Amendment (*Communist Party of United States v. Subversive Activities Control Board*, 223 F. 2d 531, 544 [App. D. C., 1954], revd. and remanded on another ground 351 U. S. 115 [1956]).

This Court has consistently held that the freedoms guaranteed by the First Amendment are not without limitation (*Debs v. United States*, 249 U. S. 211 [1919]; *Frohwerk v. United States*, 249 U. S. 204 [1919]; *Schenck v. United States*, 249 U. S. 47, 52 [1919]; *Schaefer v. United States*, 251 U. S. 466 [1920]; *Dennis v. United States*, 341 U. S. 494, 508 [1950]). It has, in fact, specifically held that the exercise of First Amendment freedoms may be restricted to protect other vital interests of the Government which are clearly necessary to the effectuation of proper Congressional power (*Schenck v. United States*, *supra*; *American Communications Association v. Douds*, 339 U. S. 382, 394, 402-404 [1950]; *Dennis v. United States*, *supra*, pp. 509-510; see also *Barenblatt v. United States*, 360 U. S. 109, 126 [1959]).

Tenth Amendment

The Tenth Amendment, too, has no bearing upon this exercise of Congressional power, because Congress acted well within its jurisdiction under the constitutional provisions for the "common defense" and the guaranty to

¹⁶ Although petitioners have not, in their brief herein, made a point of an alleged violation of the First Amendment, they did make the point in the Court of Appeals and they did obtain from the Court of Appeals an amendment of the remittitur to indicate that this point was presented to and necessarily passed upon by the Court of Appeals (48; see also 8 N. Y. 2d 1001, 169 N. E. 2d 427). Accordingly, we address a few remarks to this point.

every State of a republican form of government. (*Supra*, p. 14.)

IV. The action of the State, pursuant to the clear and unambiguous mandate of the Communist Control Act, did not result in a violation of the Fourteenth Amendment.¹⁷

Insofar as the petitioners predicate a violation of the Fourteenth Amendment on an alleged lack of a hearing, they are faced with a record showing the contrary fact. As has been heretofore stated,¹⁸ the Industrial Commissioner was under no burden, in establishing a *prima facie* case, of adducing evidence respecting the nature and character of the Communist Party; he could rely on the doctrine of judicial notice, or he could rely on the Congressional findings in the Communist Control Act,¹⁹ or both. However, it must

¹⁷ The petitioners have no right to claim a violation of the 14th Amendment, under which consideration is given to the privileges or immunities of "citizens of the United States" (*Slaughterhouse Cases*, 16 Wall. 36 [1873]). Numerous decisions have held that only natural persons are to be considered citizens under this provision (*Hague v. C. I. O.*, 307 U. S. 496, 514 [1939]; *Western Turf Ass'n v. Greenberg*, 204 U. S. 359 [1907]; see also, the concurring opinion of Mr. Justice BLACK in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 144 [1951]).

¹⁸ See *supra* pp. 4-6.

¹⁹ Due process does not require that the Congressional findings in Section 2 of the Act as to the existence of a world or an American Communist movement and as to the character thereof be the subject of redetermination before the Referee or the Appeal Board. These are general legislative findings supporting the Act as a whole and may be used, subject to evidentiary rebuttal, as the basis for a *prima facie* case supporting administrative action. This Court has specifically recognized the validity of such legislative findings (*Galvan v. Press*, 347 U. S. 522, 529 [1953]; *Carlson v. Landon*, 342 U. S. 524 [1952]). Even in the dissenting opinion of Mr. Justice FRANKFURTER in the last cited case, at page 565, he stated "The immigration authorities were by the Act relieved of proving—in order to make a *prima facie* case—that the Communist Party is an 'organization * * * that believes in, advises, advocates or teaches * * * the overthrow by force or violence of the Government.'" (Emphasis added.)

be made clear that this was purely for the purpose of establishing a *prima facie* case. The petitioners were free to submit any rebuttal evidence. The record clearly reveals that ample opportunity was afforded them to submit such evidence as they wished with respect to the nature and character of the Party but they failed to avail themselves of the proffered opportunity. They must be deemed to have waived this objection.

Insofar as the petitioners predicate a violation of due process on the lack of justification for the Commissioner's determination, conceding the criminal character of the petitioners, the respondent necessarily relies, in support thereof, on the provisions of the Communist Control Act which terminated their rights, privileges and immunities.

As to the alleged violation of the equal protection clause, a distinction must be drawn between an individual or an entity found guilty of a crime, but which is engaged in a legitimate business totally unrelated to the criminal acts, and an entity such as the Communist Party whose criminal character and activities so permeate its every fibre that it is not inherently or otherwise capable of engaging in any legal activities. Its criminal character and activities have a direct relationship to its inability to possess legal viability (*Sprott v. United States*, 20 Wall. 459, 464-465 [1874]).

ARGUMENT

POINT I

The Industrial Commissioner was legally justified in suspending the registrations of the petitioners as employers within the meaning of New York's Unemployment Insurance Law.

A. Commissioner's Power to Act.

The New York State Labor Law, § 571, empowers the Industrial Commissioner to determine the amount of contributions due from an employer, but neither this section of the law nor any other expressly authorizes the Commissioner to determine that a specific person is an employer within the meaning of § 571. Nevertheless, the question has been definitely answered in *Matter of Electrolux Corp.*, 286 N. Y. 390, 36 N. E. 2d 633 (1941), wherein it was said (p. 397):

“[T]he statute here confers upon the Commissioner by necessary implication both power and duty to determine the persons who are employers and the persons who are employees within the meaning of the statute, * * * and the statute does not restrict the discretion of the Commissioner in respect to how or when a rule or order shall be made determining a controversy in that field.”

Implicit, of course, in the power to determine who is an employer within the meaning of the statute is the power to determine who is *not* or who *cannot* be an employer under the statute.

- B. The suspension was justified by reason of the fact that each of the petitioners constitutes a criminal conspiracy, the principal object of which is the overthrow of the Government of the United States and the Government of the State of New York by force and violence.**

It must be reiterated at this point that none of the parties adduced any evidence whatsoever either at the hearings before the Referee or at the hearing before the Appeal Board as to the character of the petitioners. Not having submitted any evidence to controvert the fact that they were a criminal conspiracy, the petitioners are deemed to have waived any objections that they might otherwise have asserted to a determination based upon such fact.

The Commissioner, on the other hand, is in an entirely different position. It was not incumbent upon him affirmatively to adduce evidence of the fact. He could rely completely upon the fact that judicial notice would be taken at all stages of the proceeding of the fact that the petitioners constituted a criminal conspiracy. The time has long gone by since the Communist conspiracy has to be affirmatively proven as a fact in each case in which the question arises.

1. Judicial Notice.

Whatever the rule may have been prior thereto, it was considered and in *In re McKay*, 71 F. Supp. 397 (N. D. Ind., 1947). In this case a petition for the naturalization of a Communist Party member was denied on the ground that he was a member of an organization that advocated the overthrow of the government. Although the Court based its decision partially on evidence, such as party pub-

lications which had been submitted at the hearing, it stated (p. 399):

"Furthermore, it is my opinion that the Court may take judicial knowledge of the historical fact that Communism, based on the writings and teachings of Marx and Engels, advocates force and a so-called dictatorship of the proletariat as a necessary means of obtaining the objectives of Communism; and, also, that conformity to prevailing democratic processes by Communists in a particular country is for tactical purposes only inasmuch as a world-wide revolution is the ultimate objective, which objective is the common bond of the Communist parties in the various countries of the world."

One year later a case arose involving the constitutionality of the non-communist affidavit requirements of the Labor Relations Management Act of 1947 (61 Stat. 136, 29 U. S. Code §§ 141 *et seq.* [Supp. 1952]). The Court, in *National Maritime Union of America v. Herzog*, 78 F. Supp. 146 (Dist. of Col., 1948), *affd.* 334 U. S. 854 (1948), dismissed the complaint, holding that the statute was constitutional as based on the legislative finding that industrial unrest would be fomented and the country injured by political strikes instituted by the party in conformance with the party's nature and purposes. There was thus a basis for the statute in preventing a clear and present danger to the national economy. The Court said (p. 170):

"Actualities are ignored when it is contended that a Communist may be without a purpose to create unrest and disturbances in a democracy. The Communist Party is known to be organized for the purpose of promoting throughout the world a program to spread communism. This program is its primary objective, to which all else must yield. The pattern followed, demonstrated by statements of its leaders, and even more convincingly by acts of its members, is to create economic unrest in a democracy; to encourage and promote strikes wherever possible, for by such

agitation, democracies will become unpopular and communism will take their place. *Evidence in a judicial proceeding is not needed to establish these as primary objectives.* The pages of history within late years establish them beyond the power of successful contradiction." (Emphasis added.)

In Pennsylvania (*Appeal of Albert*, 372 Pa. St. 13, 92 A. 2d 663 [1952]), it was held that a school board was justified in discharging a teacher for being a member of the Communist Party and for advocating or participating in un-American or subversive activities or doctrines in violation of the statute governing the public schools. The Court said (pp. 19-22):

"Her chief complaint, however, on this appeal, is that the Board not only took judicial notice of the fact that the Communist Party advocates the overthrow of the United States government by force and violence, but it refuses to allow her to present testimony to the contrary. This court has definitely decided that judicial notice may be taken of the fact that the Communist Party is a subversive organization which conspires to teach and to advocate the overthrow of the government of the United States by force and violence: [citing cases]. The doctrine of judicial notice is intended to avoid the necessity for the formal introduction of evidence in certain cases when there is no real need for it, where a fact is so well established as to be a matter of common knowledge. That the Communist Party advocates the use of violence to overturn the governments of non-Communist countries, and especial: that of the United States, has been proclaimed in legislative statutes, and can fairly be said to be a matter of general notoriety. It would seem almost an absurdity of legal procedure to continue to submit to various juries in individual cases a question so readily and authoritatively determinable from the mere perusal of the writings of the acknowledged founders and protagonists of the Communist movement—Marx, Engels, Lenin, Stalin and others which teach the doctrine of proletarian revolution, the

dictatorship of the proletariat, and the overthrow of the capitalist system and 'bourgeois democracy,' to be consummated by the forcible overthrow of the governmental organizations upon which alleged capitalist exploitation depends. Both general knowledge and accepted history stamp as indubitably true the statements contained in the opinion of Mr. Justice Jackson in *American Communications Association, C. I. O. v. Douds*, 339 U. S. 382, * * * [See pages 28-30, *infra*]. All the facts thus stated have long since become matters of such general notoriety that they are properly the subject of judicial notice."

As a matter of fact, Pennsylvania seems to have been the first jurisdiction to recognize the application of the rule as to judicial notice in this regard. As early as 1941 it was said in *Powell v. Unemployment Compensation Board of Review*, 146 Pa. Super. 147, 22 A. 2d 43 (pp. 150-151):

"What the policy of the Communist Party is, does not appear from the evidence. But courts have long recognized and have taken judicial notice that Communism, as a political movement, is dedicated to the overthrow of the government of the United States [and, with it, the governments of the States as necessary incidents in our system of divided sovereignty] by force and violence. * * *

For ourselves, we are not willing to say that courts are such impotent instruments of government that they may not take judicial notice of facts so well known to the man on the street" (Italics by Court.)

The New York Court of Appeals, too, has recognized the Communist Party for what it really is. In *Matter of Daniman v. Board of Education of the City of New York*, 306 N. Y. 532, 119 N. E. 2d 373 (1954), it was said (p. 540):

"In this court we are all agreed that the Communist party is a continuing conspiracy against our Government."²⁰

²⁰ Reversed on other grounds as to one petitioner, 350 U. S. 551 (1956).

As recently as 1957 the Court of Appeals reiterated its position in *Matter of Lerner v. Casey*, 2 N. Y. 2d 355, 372, 141 N. E. 2d 533. (1957) by defining the Communist Party as "a continuing conspiracy against our form of government". The *Lerner* case was affirmed by this Court in 357 U. S. 468 (1958).

And still more recently, in *Nostrand v. Balmer*, 53 Wash. 2d 460, 335 P. 2d 10 (1959), it was said (p. 22):

"Even prior to the commencement of hostilities in Korea in 1950, numerous judges had recognized the communist party as a part of a world conspiracy having as its prime objective the overthrow of the United States government by force and violence, or whatever means possible, constitutional or otherwise. Since then, Congress, in 1950, enacted legislation designed to control the communist party, and, in 1954, proscribed it. The courts of New Jersey and Pennsylvania take judicial notice of the fact. We can, and do now, hold likewise, because the fact that the communist party is a subversive organization is now a matter of common knowledge."

The higher Federal Courts, too, have affirmed this principle and have expressly rejected the contrary rule which had formerly been recognized. Thus, in *Carlson v. Landon*, 187 F. 2d 991 (9th Cir., 1951), the Court said (p. 997):

"It is said by the appellant that there is no proof here as to the intention of the Communist Party of the United States or of Communists to maim or destroy our government by force and violence, and cites the *Schneiderman case* (*Schneiderman v. United States*), 320 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796. The *Schneiderman case* was of yesterday. As Justice Hughes one time so expressively said, 'Courts do not function in a vacuum.' The Courts today are acquainted with current history and, too, with the legislative findings set out in the Internal Security Act of 1950, from which we quoted liberally in the first Carlson opinion.

The existence as of today of a world-wide conspiracy against free democratic government by a major world power using as its vehicle the establishment of Communism by force and violence, is perfectly clear and incontrovertible." (Emphasis added.)

The *Carlson* case was affirmed by this Court (342 U. S. 524 [1952]). Even in the dissenting opinion Mr. Justice FRANKFURTER stated (p. 565):

"The immigration authorities were by the Act relieved of proving—in order to make a *prima facie* case—that the Communist Party is an 'organization . . . that believes in, advises, advocates, or teaches . . . the overthrow by force or violence of the Government.' But in the circumstances of today a legislative definition of the Communist Party as an organization advocating violent overthrow of government made little difference in the required proof."

And in *Martinez v. Neelly*, 197 F. 2d 462 (7th Cir., 1952), affd. 344 U. S. 916, it was said (p. 465):

"The time has passed when it can successfully be contended that proof is required that the Communist Party is or has been an organization which advocates 'the overthrow by force or violence of the Government of the United States.'"

In *American Communications Association, C. I. O. v. Douds*, 339 U. S. 382 (1950), Mr. Justice JACKSON, in a concurring opinion, said (pp. 424-433):

"From information before its several Committees and from facts of general knowledge, Congress could rationally conclude that, behind its political-party facade, the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system. . . ."

1. *The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free elec-*

torate. It seeks not merely a change of administration, or of Congress, or reform-legislation within the constitutional framework. Its program is not merely to socialize property more rapidly and extensively than the other parties are doing. While the difference between other parties in these matters is largely as to pace, the Communist party's difference is one of direction.

The Communist program only begins with seizure of government, which then becomes a means to impose upon society an organization on principles fundamentally opposed to those pre-supposed by our Constitution. It purposes forcibly to recast our whole social and political structure after the Muscovite model of police-state dictatorship. It rejects the entire religious and cultural heritage of Western civilization, as well as the American economic and political systems. This Communist movement is a belated counter-revolution to the American Revolution, designed to undo the Declaration of Independence, the Constitution, and our Bill of Rights, and overturn our system of free, representative self-government.

• • • It matters little by whom the first blow would be struck; no one can doubt that an era of violence and oppression, confiscations and liquidations would be concurrent with a regime of Communism.

• • •

The Communist Party alone among American parties past or present is dominated and controlled by a foreign government. It is a satrap party which to the threat of civil disorder, adds the threat of betrayal into alien hands.

• • •

3. *Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal.* It would be incredible naïveté to expect the American branch of this movement to forego the only methods by which a Communist Party has anywhere come into power. • • • [C]onspiracy, violence,

intimidation and the *coup d'etat* are all that keep hope alive in the Communist breast.

. . .

5. *Every member of the Communist party is an agent to execute the Communist program.* . . .
(Italics by the Court.)

During the same year this Court rendered its opinion in *Dennis v. United States*, 341 U. S. 494 (1950), in which the Court said (p. 547):

"In finding that the defendants violated the statute, we may not treat as established fact that the Communist Party in this country is of significant size, well-organized, well-disciplined, conditioned to embark on unlawful activity when given the command. But in determining whether application of the statute to the defendants is within the constitutional powers of Congress, we are not limited to the facts found by the jury. *We may take judicial notice that the Communist doctrines which these defendants have conspired to advocate are in the ascendancy in powerful nations who cannot be acquitted of unfriendliness to the institutions of this country.* We may take account of evidence brought forward at this trial and elsewhere, much of which has long been common knowledge. In sum, it would amply justify a legislature in concluding that recruitment of additional members for the Party would create a substantial danger to national security." (Emphasis added.)

Lastly, on this point, and by way of summary, reference may be had to *Dworken v. Cleveland Board of Education*, 42 Ohio Op. 240, 94 N. E. 2d 18 (1950), aff'd 63 Ohio L. Abst. 10, 108 N. E. 2d 103 (1951), dism. 156 Ohio St. 346, 102 N. E. 2d 253 (1951), in which the Court said (p. 246):

"Courts now take judicial notice that whoever is a Communist is by reason of that fact a member of an organization the international purpose of which is to destroy the government of these United States. While our courts were slow to come to the view, and the

higher the court the slower it came, our courts now nevertheless recognize and take judicial notice of this fact of which our people universally took recognition long before."²¹

In attempting to refute the argument with respect to judicial notice of the *character of the Communist Party* counsel argued in the Court below that *In re McKay* (cited *supra*, p. 23) is inconsistent with or has been overruled by *Nowak v. United States*, 356 U. S. 660 (1958). In this counsel is in error. In *In re McKay* judicial notice was taken among other things, of the fact that Communism advocates the forcible overthrow of the government. The *Nowak* case did not disagree with this concept; it merely held that in denaturalization proceedings proof merely of membership in the Communist Party was not sufficient to show that the *petitioner* therein was not attached to the

²¹ That the tiger has not changed its stripes is eloquently attested to by the statement issued by the conference of representatives of 81 Communist parties, held in Moscow in November, 1960. Excerpts therefrom, as provided in English by Tass, Soviet press agency, and reprinted in the New York Times, December 7, 1960, pp. 14-17, are set forth in Appendix B hereto, *infra*, pp. 92-95. The tenor of the manifesto was commented upon by the New York Times on the same day (p. 42) in an editorial entitled "World Communist Program". The Times said, in part: "After one has waded through the mass of verbiage, the central policy directive becomes plain. It is a directive to Communists the world over to step up in every way possible the war against free men, using every possible weapon from armed revolution to diplomatic negotiations. * * * One central fact emerges from this document. The communists of the world believe more firmly than ever that they represent the wave of the future. They support their belief by referring to a wide variety of factors ranging from our current domestic economic decline to the political setbacks we have suffered in some foreign countries. This confidence, and the evidence presented to back it, should serve to remind us of the need for doing a better job in the future than in the past in keeping ourselves strong domestically and in effectively combatting Communist subversion and infiltration against the free world on every front." (Emphasis added.)

principles of the Constitution because it did not prove by clear, unequivocal, and convincing evidence that he, personally, *knew* that the Party advocated the violent overthrow of the Government. As a matter of fact, the Court implicitly recognized the historical character of the party. *But that was not the test.* The test in the *Nowak* case was: Did the *petitioner* therein know that the Party advocated the violent overthrow of the Government? This was a subjective matter as to which this Court held there was insufficient evidence.

Comparison was also made by counsel, in ostensible refutation of the respondent's position, of *Appeal of Albert* (cited *supra*, p. 25), with *Adler v. Board of Education*, 342 U. S. 485 (1952). But *Adler* is in agreement with our position in the case at bar. We have said that the Commissioner could, in the first instance, rely on the doctrine of judicial notice in establishing a *prima facie* case; that it was not incumbent upon the Commissioner affirmatively to adduce evidence of facts which could be judicially noticed. Having thus established a *prima facie* case, it was then the burden of the petitioners to submit, if they could, evidence to controvert such facts. In the *Adler* case this Court said (pp. 494-496):

"Membership in a listed organization found to be within the statute and known by the member to be within the statute is a legislative finding that the member by his membership supports the thing the organization stands for, namely, the overthrow of government by unlawful means. We cannot say that such finding is contrary to fact or that 'generality of experience' points to a different conclusion. Disqualification follows therefore as a reasonable presumption from such membership and support. Nor is there here a problem of procedural process. The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has full

opportunity to rebut it. The holding of the Court of Appeals below is significant in this regard: 'The statute also makes it clear that * * * proof of such membership "shall constitute *prima facie* evidence of disqualification" for such employment. But, as was said in *Potts v. Pardee* (220 N. Y. 431, 433): "The presumption growing out of a *prima facie* case * * * remains only so long as there is no substantial evidence to the contrary: When that is offered the presumption disappears, and unless met by further proof there is nothing to justify a finding based solely upon it." * * * In that view there here arises no question of procedural due process.' 301 N. Y. 476, at p. 494, 95 N. E. 2d 806, at 814-815.

Where, as here, the relation between the fact found and the presumption is clear and direct and is not conclusive, the requirements of due process are satisfied."

The *Adler* case describes the situation in the case at bar. Here the Industrial Commissioner relies on the doctrine of judicial notice to establish a *prima facie* case. The petitioners were thereupon free to rebut such facts. They were offered the opportunity to do so, but refrained. The rebuttable presumption has, at least for the purpose of this case, now become conclusive. The character of the Communist Parties, as a factual matter herein, stands established as a criminal conspiracy for the forcible overthrow of the Government.

Counsel for the Communist Parties also cited *Schwartz v. Board of Bar Examiners*, 353 U. S. 232 (1957), in attempted refutation of the judicial notice argument. This case simply held that the doctrine of judicial notice of the character of the Party cannot be employed as a substitute for evidence in any case involving the requirement of proof that a *particular member* of the Party participated in any illegal activity or did anything morally reprehensible

as a member. The petitioners have failed to distinguish between the crime itself and the perpetrator of the crime. The Courts need no evidence to substantiate or establish the fact that certain acts, by definition, constitute a crime. Thus, the Communist Party, U. S. A. and its subordinates and affiliates on other geographical levels, *in and of themselves* constitute a criminal conspiracy and no evidence of such fact needs to be adduced. They are a crime, just as burglary and arson, murder and treason are crimes. We are not dealing here with any particular individual who, as a member of the Party or otherwise, commits "communism".

The cases upon which counsel for the Communist Parties relied, deal with the problem of proving the guilt of an *individual* with respect to such crime. Thus, counsel erroneously asserted that in this Court's decision in *Fates v. United States*, 354 U. S. 298 (1957), it was held that the government had been unable to prove, in a prolonged trial, the proposition as to which the respondent contends the Court is required to take judicial notice. But *Yates* involved the question of the guilt of *individuals*. In the case at bar the only factual justification required to sustain the action of the Appeal Board is that the Communist Party is or has been an organization which advocates the overthrow by force or violence of the Government of the United States. The cases which we have cited amply support the view that judicial notice may be taken of that fact. If there remains any doubt in that regard, the doubt was laid to rest in *Barenblatt v. United States*, 360 U. S. 109 (1959), in which this Court said (pp. 127-129):

"That Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable. The existence of such power has never been questioned by this Court, and it is sufficient

to say without particularization, that Congress has enacted or considered in this field a wide range of legislative measures, not a few of which have stemmed from recommendations of the very Committee whose actions have been drawn in question here. In the last analysis this power rests on the right of self-preservation, 'the ultimate value of any society,' *Dennis v. United States*, 341 U. S. 494, 509. Justification for its exercise in turn rests on the long and widely accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence, a view which has been given formal expression by the Congress.

On these premises, this Court in its constitutional adjudications has consistently refused to view the Communist Party as an ordinary political party, and has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character. See, e.g., *Carlson v. Landon*, 342 U. S. 524; *Galvan v. Press*, 347 U. S. 522. On the same premises this Court has upheld under the Fourteenth Amendment state legislation requiring those occupying or seeking public office to disclaim knowing membership in any organization advocating overthrow of the Government by force and violence, which legislation none can avoid seeing was aimed at membership in the Communist Party. See *Gerende v. Board of Supervisors*, 341 U. S. 56; *Garner v. Board of Public Works*, 341 U. S. 716. See also *Beilan v. Board of Public Education*, 357 U. S. 399; *Lerner v. Casey*, 357 U. S. 468; *Adler v. Board of Education*, 342 U. S. 485. Similarly, in other areas, this Court has recognized the close nexus between the Communist Party and violent overthrow of government. See *Dennis v. United States*, *supra*; *American Communications Ass'n, C. I. O. v. Douds*, [339 U. S. 382] *supra*. To suggest that because the Communist Party may also sponsor peaceable political reforms the constitutional issues before us should now be judged as if that Party were just an ordinary political party from the standpoint of national security, is to ask this Court to blind itself to world affairs which have determined the whole course

of our national policy since the close of World War II, affairs to which Judge LEARNED HAND gave vivid expression in his opinion in *United States v. Dennis*, 2 Cir., 183 F. 2d 201, 213, and to the vast burdens which these conditions have entailed for the entire Nation."

2. Legislative Findings.

Closely akin to the establishment of the character and nature of the Communist Party under the doctrine of judicial notice is the fact that great weight must be accorded to the legislative findings of Congress and of the legislatures of New York and other states with respect to the character and nature of the Communist Party (See Subversive Activities Control Act of 1950, 50 U. S. Code § 781, 64 Stat. 987 Appendix A, *infra*, pp. 82-85; Communist Control Act of 1954, 50 U. S. Code § 841, 68 Stat. 775, Appendix A, *infra*, pp. 85-86; Feinberg Law, L. 1949, ch. 360, § 1, Appendix A, *infra*, pp. 89-90; Report of U. S. House of Representatives dated August 22, 1950 [House Report No. 2980]; U. S. Code Cong. and Admin. News 1950, p. 3886, Appendix A, *infra*, pp. 90-91).

Examination of the legislative history of the Communist Control Act establishes that the Act was the product of extensive legislative investigation. In the light of the evidence adduced upon the investigation, and in view of the fact that the legislative conclusions are in accord with the matters as to which judicial notice has been taken (See Subd. 1, *supra*), it must be held that the findings are reasonable and based upon a rational foundation. Under such circumstances the findings are entitled to great weight. See e.g., *American Communications Association, C. I. O. v. Douds*, 339 U. S. 382, 391 (1950); *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937); *Block v. Hirsh*, 256 U. S. 135 (1921). In the last cited case the Court said (p. 154):

"But a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect."

Legislative facts are general conclusions which support the policy of a particular law, and can be attacked only by showing that Congress acted arbitrarily or unreasonably or beyond its delegated powers (*Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, 465-466 [1945]; *United States v. Carolene Products Co.*, 304 U. S. 144, 152-153 [1938]). Although courts may make inquiry to determine whether there is a reasonable basis for the legislative action (*United States v. Carolene Products Co.*, *supra*, 304 U. S., at p. 153; *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 209-210 [1934]; *Chastleton Corp. v. Sinclair*, 264 U. S. 543, 547-548 [1924]), the inquiry is limited to the question of reasonableness.

Here, Congress recorded in Section 2 the basis for its action, the threat to the United States presented by the Communist movement. The existence of that threat and of that movement are recognized facts of modern history.²² Congress cannot be accused of irrationality in taking account of them. (*Cf. Barenblatt v. United States*, 360 U. S. 109, 127-129 [1959]).

In short, the legislative findings in Section 2 are "[t]he reasons for the exercise of the power" by Congress (*Carlson v. Landon*, 342 U. S. 524, 535 [1952]). And as this Court said, with respect to similar findings,²³ in *Galvan v. Press*, 347 U. S. 522, 529 (1953):

"On the basis of extensive investigation Congress made many findings including that in § 2(1) of the Act

²² See *infra*, pp. 70, 82-86.

²³ Section 2 of the Internal Security Act of 1950 (64 Stat. 987, 50 U. S. Code § 781 [*infra*, pp. 82-85]).

that the 'Communist movement * * * is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism and any other means deemed necessary, to establish a Communist totalitarian dictatorship,' and made present or former membership in the Communist Party, in and of itself, a ground for deportation. Certainly we cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress."

And in *Communist Party of U. S. v. Subversive Activities Control Board*, 223 F. 2d 531 (App. D. C., 1954), rev'd and remanded on another ground 351 U. S. 115 (1956), the Court said (p. 565):

"In Section 2 of the Act, as we have pointed out, Congress made findings upon the existence and the nature of the world Communist movement. Some years ago, a difference of opinion existed as to the extent to which courts are bound by legislative findings of facts in cases in which constitutional questions are posed. Since then the Supreme Court has resolved the problem in *American Communications Ass'n v. Douds* and *Galvan v. Press*, both *supra*. The rule, as we understand it, is that, if it appears Congress has power over the subject matter of a statute, and if findings of fact are not baseless but are based upon extensive investigation, the courts are to adopt those findings."

The Court then quoted from the *Galvan* case, as set forth above, (p. 37) and concluded (p. 566):

"From that viewpoint, and without going further, there is, then, for our purposes in reviewing this order under this statute, a world Communist movement whose purpose it is, by treachery, sabotage, or any other necessary means, to establish a Communist proletarian dictatorship throughout the world."

By the same token, for the purposes of any case to which the Communist Control Act is applicable, such as the case at bar, the Communist Party, U. S. A. is "an instrumentality of a conspiracy to overthrow the Government of the United States," is dedicated "to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence," is an "agency of a hostile foreign power" which "renders its existence a clear, present and continuing danger to the security of the United States," and it should, therefore "be outlawed."

3. Inherent illegality.

It is apparent from the foregoing that, in the absence of evidence to controvert the fact, as is the situation in the case at bar, both the doctrine of judicial notice and the rule that legislative findings must be accorded great weight, establish the fact that the petitioners constitute a criminal conspiracy to overthrow the Government of the United States and the Government of the State by force and violence. As such, they are illegal organizations whose illegality permeates every facet of their operations. The illegality is based on the concept of being both constitutionally and morally wrong. In other words it is *malum in se*. They are constitutionally incapable of an innocent or legal act. Just as the Devil may quote Scripture, so may the Communist Party erect a facade of legal respectability, but it is simply a snare and a delusion. It does not have the capacity to enjoy any of the rights, privileges and immunities of a legal enterprise.

As Judge VAN VOORHIS said, in his partial concurrence in the Court below (44-45):

"If the Communist Party in the United States is 'the agency of a hostile foreign power' and 'an instru-

mentality of a conspiracy to overthrow the Government of the United States' as the Congress of the United States has determined (U. S. Code, tit. 50, § 841), on account of which it has been 'outlawed' and declared not to be 'entitled to any of the rights, privileges and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof' (*id.*, § 842), then it cannot be recognized as a legitimate employer or its servants as legitimate employees. It has no living legal tissue. It enjoys neither the identity nor the rights, privileges or immunities of a legal organization. Unless these findings by the Congress are idle words, it lacks the power to make contracts and cannot enter into the relationship of employer and employee. No agency of a foreign power or its subsidiary organizations can have a legal status as part of 'an authoritarian dictatorship within a republic,' as the Communist Control Act says, certainly where its reason for existence is that which is above stated. * * *

This is not the case of a criminal who is also engaged in a legitimate enterprise in which he has hired employees. Nor is it a case involving a legitimate employer in a legitimate business indulging in some illegal practices in connection with his business. This is a case in which the "business" itself, the ends to be attained and the means used to attain those ends are wrong not only according to our laws but according to our moral and political standards. Thus, in *Sprott v. United States*, 20 Wall. 459 (1874), a case involving proprietary rights which arose out of a business transaction with the Confederate States, this Court affirmed a judgment which denied such rights. The Court said (pp. 464-5):

"It [i.e., the government of the Confederate States] had no existence, except as a conspiracy to overthrow lawful authority. Its foundation was treason against the existing Federal government. Its single purpose, so long as it lasted, was to make that treason success-

ful. So far from being necessary to the organization of civil government, or to its maintenance and support, it was inimical to social order, destructive to the best interests of society, and its primary object was to overthrow the government on which these so largely depended. Its existence and temporary power were an enormous evil, which the whole force of the government and the people of the United States was engaged for years in destroying.

“ * * * no validity can be given in the courts of this country to acts voluntarily performed in direct aid and support of its unlawful purpose.”

The fact of the matter is that “There is no right to pursue an unlawful business” (*People v. Zinke*, 170 Misc. 332, 333, 10 N. Y. S. 2d 313 [Co. Ct., Kings Co., 1939]) and even where the illegality is merely *malum prohibitum* it has been held that no rights may arise therefrom. Thus, in *Matter of Clarke v. Town of Russia*, 283 N. Y. 272, 28 N. E. 2d 833 (1940), involving a Workmen's Compensation claim where the claimant had been a highway employee and a member of the Town Board, the Court denied benefits under the Workmen's Compensation Act. There was a statutory provision making it illegal for a member of the Town Board to be engaged as a highway employee. The Court said (p. 274):

“The decedent's contract of employment was not merely voidable, but void. A compensation award based upon an illegal contract which is void cannot be sustained (*Matter of Swihura v. Horowitz*, 242 N. Y. 523; *Herbold v. Neff*, 200 App. Div. 244.)”

In *Herbold v. Neff*, 200 App. Div. 244, 193 N. Y. S. 2d 244 (3rd Dept., 1922), involving a Workmen's Compensation claim, the Court said (p. 245):

“ * * * the occupation of the deceased was that of a bartender in a saloon selling intoxicating liquors. The accident occurred in December, 1919. It is a fact familiar to all that at the time of the accident the sale

of intoxicating liquors was unlawful. The deceased and his employer were, therefore, engaged in an unlawful occupation. This court cannot lend its aid to the enforcement of any claim growing out of a contract of employment one of the purposes of which is the violation of a law of the land making the sale of intoxicating liquors a criminal offense. Therefore, the award cannot stand."

See, also: *Snyder v. Morgan*, 9 N. J. Misc. 293, 154 A. 525, 526 (Ct. of Common Pleas, Morris Co., 1931).

Since any contract of employment or otherwise to which the Communist Party is a party is necessarily void, it is apparent that the Communist Party does not possess the capacity to be an employer; it simply does not possess the right to employ individuals. Consequently it cannot properly be subjected to, or permitted to pay, the Unemployment Insurance Tax because the latter has been held to be an excise tax on the right to employ individuals (*Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 508-509 [1937]; *Charles C. Steward Mach. Co. v. Davis*, 301 U. S. 548, 579-580 [1937]; *Matter of Cassaretakis*, 289 N. Y. 119, 126, 4 N. E. 2d 391 [1942], aff'd 319 U. S. 306 [1943]).

The reverse side of the coin must also be observed. Since illegality of the hiring relationship results from the basic incapacity of the employer, employees can derive no benefits therefrom. It is true that under the Unemployment Insurance Law the employee's rights to benefits are not derivative in character where there is conceded coverage under the law, so that the failure in such a case of the employer to pay the unemployment insurance taxes does not affect the employee's right to benefits. Where, however, there is no coverage to begin with, the Party is not an "employer" and its employee is not an "employee" within the meaning of the law. Although absence of cover-

age is predicated upon illegality, the rights of the employer and the employee must be determined upon the basis of coverage. The Unemployment Insurance Law does not apply to all employments even though such employments are not tainted with illegality. Thus, among others, agricultural labor is not included as "employment" (N.Y. Labor Law § 511[6]). Obviously, in view of the established lack of coverage, it is immaterial, irrelevant and incompetent that the State passively permitted the Party to hire employees in the past. It is equally immaterial, irrelevant and incompetent that no criminal or conspiratorial act is shown as to the actual work for the Communist Party performed by an employee. And it is no more material, relevant or competent that employees of the Party have not been expressly deprived of unemployment insurance benefits than it is that farm workers are not so expressly deprived. The statute is addressed to the *employment*, not the *employee*. It seems clear that in the absence of coverage as to employment, there is no difference in result simply because a particular employee has not personally suffered outlawry or deprivation of civil rights.

- C. Any rights, privileges and immunities which the petitioners may have had, including the right to be classified as an employer within the meaning of the Unemployment Insurance Law, were terminated by the Communist Control Act of 1954.

1. Termination of rights, privileges and immunities.

Both of the petitioners are proscribed under Section 3 of the Act (50 U.S. Code § 842, Appendix A, *infra*, p. 87). The Communist Party of the United States is proscribed

by name. The Communist Party of the State of New York is not mentioned by name. However, the title of the section is: "Proscription of Communist Party, its successors, and subsidiary organizations." (Emphasis added.) Although the section begins by saying that the "Communist Party of the United States, or any successors of such party" is not entitled to rights, privileges, and immunities, the clause which actually terminates these rights, privileges and immunities is directed against "said party or any subsidiary organization." (Emphasis added.) This language, standing by itself, is broad enough to include the Communist Parties of the various States and Territories. However, if there is any doubt about the matter, reference may be had to the definition of the term "Communist Party" which appears in section 4(b) (50 U. S. Code § 843[b], Appendix A, *infra*, pp. 87-88) of the Act (which is in *pari materia* with section 3). The term "Communist Party" is defined in section 4(b) as "the organization now known as the Communist Party of the United States of America, the Communist Party of any State or subdivision thereof, and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name thereof."

Preliminarily, it should be observed that the petitioners have effectively argued themselves out of Court. They state that they are unincorporated associations, that they are not artificial entities and have no existence independent of their members. "Obviously," as they said in the Court below, "they do not have the right to enter into contracts, including contracts of employment. In New York, it is not the organization but *its members* who have and may exercise rights. It is they, and not the organization, who have the right to enter into contracts which are en-

forceful by or against *them*." (Italics as in brief below.) The petitioners continued as follows: "The nature of the employment contracts involved in this proceeding must, of course, be determined by reference to New York law. It follows that they are not contracts of the National or the State Party, which are unknown to New York law."²⁴

But the Industrial Commissioner has suspended the registrations under the Unemployment Insurance Law of the Communist Party, U. S. A. and the Communist Party of the State of New York. It is of these suspensions that they complain. However, they have succeeded in proving that they are as illusive in law as they are elusive in fact.

²⁴ Because unincorporated associations such as the Communist Party (38) are not considered legal entities at common law, they do not have a common law right in their own names, to sue and be sued in civil suits in the state courts (WRIGHTINGTON, *Unincorporated Associations and Business Trusts*, pp. 425-436 [2d ed., 1923]; STARR, *Legal Status of American Political Parties*, 34 Am. Pol. Sci. Rev., pp. 439, 685, 693 [1940]; 7 C. J. S., *Associations*, § 36, pp. 88-89 [1937]), nor to hold or convey property (3 CASNER, *American Law of Property*, § 12.78 [1952]; 4 *id.* § 18.50; LLOYD, *Unincorporated Associations*, pp. 165-178 [1938]; PATTON, *Titles*, § 228 [1938]; 1 POWELL, *Real Property*, §§ 130-131 [1949]; 7 C. J. S., *Associations*, § 14 [1937]), nor to enter into contracts (*Hunt v. Adams*, 111 Fla. 164, 149 So. 24 [1933]; *I. W. Phillips & Co. v. Hall*, 99 Fla. 1206, 128 So. 635 [1930]; *Franklin Paper Co. v. Gorman*, 76 Pa. Super. 276 [1921]).

In addition to statutes giving a political party the right to appear on the ballot, many states now have laws giving unincorporated associations the capacity to sue or be sued in their own names or in the name of a designated officer (4 AM. JUR., *Associations and Clubs*, § 47 [1936]; *Moffat Tunnel League v. United States*, 289 U. S. 113 [1933]; *Brown v. Protestant Episcopal Church*, 8 F. 2d 149 [E. D. La., 1925]; *Donovan v. Danielson*, 244 Mass. 432, 138 N. E. 811 [1923]). Although many states have given certain unincorporated associations the right to take and hold property (1 POWELL, *Real Property*, pp. 490-491, nn. 39, 40 [1949]), very few of these statutes are broad enough to cover political parties. Moreover, it seems that no state has made general statutory grant to unincorporated associations of the right to enter into contracts in their own names.

Since they have no existence they are not in possession of any rights, privileges or immunities, for the deprivation of which they can make legal complaint. So be it. The determination of the Court below should be affirmed for this reason alone.

Even if the contracts, as the petitioners assert, are the contracts of the members of the organization collectively, they are not aided by that fact. Although section 3 of the Act applies, by its terms, only to organizations, it is apparent that if the deprivation against the organizations is to be effective, and if complete stultification is to be avoided, the statute must necessarily be applied to its members as well for the purpose of applying it to the organization. It has, in fact, been so held in *Salwen v. Rees*, 16 N. J. 216, 108 A. 2d 265 (1954), in which the constitutionality of the Communist Control Act was upheld and its applicability to rights, privileges and immunities arising under State law was recognized. The Court acknowledged that the Act does not deal with an individual except insofar as the individual is identified with the Communist Party, and said (p. 217):

"Indeed, the plaintiff argues in his brief and argues here orally through his counsel that the federal statute has to do with the Communist Party as such and not with the plaintiff nor with any person individually. With that proposition the court is in agreement. And as for the county clerk, he is dealing with the plaintiff in the manner that he does only in order that he may deal with the Communist Party as such. It is not the county clerk's fault. It is the plaintiff's fault who insists upon identifying himself with the party and becoming its embodiment, so to speak, in the choice of a campaign slogan as candidate for the office he seeks."

Certainly members of the Communist Party are so directly tied to the organization that they are as much bound

by the provisions of the Communist Control Act as was the plaintiff in the cited case.

In any event, whether the rights, privileges and immunities be considered those of a true artificial entity or those of the members who collectively constitute the proscribed organization, there is no doubt that the Act affects rights, privileges and immunities which arise under State law.

The petitioners distinguish between the phrase at the beginning of section 3, "the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein," (Appendix A, *infra*, p. 87), and the two phrases at the end of the section dealing with nonentitlement to any rights, privileges, and immunities of bodies created under the jurisdiction "of the laws of the United States or any political subdivision thereof," and termination of rights granted by reason "of the laws of the United States or any political subdivision thereof". The petitioners assert that the wording of the latter two clauses demonstrates Congressional recognition of the distinction between "a political subdivision" and a "State," and, therefore, conclude that the words "political subdivision," as used in the last clause, is a shorthand reference to the federal territories and possessions and the District of Columbia, all of which are "political subdivisions" of the United States.

In the first place it must be observed that even in the absence of other factors which would aid in the process of statutory interpretation, the mere absence of the word "State" in a federal statute does not exclude applicability of the statute to the States. Thus, in *Case v. Bowles*, 327 U. S. 92 (1946), the Court said (p. 99):

"Petitioner presses this contention so far as to urge us to accept as a general principle that unless Congress actually uses the word 'state,' courts should not construe regulatory enactments as applicable to the States. This Court has previously rejected similar arguments, and we cannot accept such an argument now."

Secondly, it was quite clearly the intent of Congress to include in the last two phrases, in short-hand form, the same political entities as were included in detail in the first phrase. This is apparent from the context of the latter two phrases, in which the political entities referred to are entities having lawmaking powers. Certainly, the District of Columbia and many of the federal possessions do not have independent or sovereign law-making powers under which corporations may be formed and under which statutory rights, privileges and immunities may arise. Laws for the District and such possessions are enacted directly by Congress. A State, on the other hand, has independent, sovereign, law-making powers in the respect stated.

The petitioners' analysis, confining the meaning of "political subdivision" in the last clause to the District and federal possessions, is furthermore illogical because these, too, were specifically referred to in the first clause. The more logical conclusion would seem to be that in the first clause the words "political subdivisions" refer to *local* governmental units within the States and Territories, while the words "political subdivision" as used in the last clause, actually terminating the rights of the Communist Party, include the States.

This interpretation is furthermore in accord with the congressional intent, as the intent is reflected in the legislative record. Although Senator Butler said that section

3 strips the Communist Party of all its rights, privileges and immunities under the Constitution of the United States and all laws of the United States (100 Cong. Rec. 14079, 14081 [daily ed. August 17, 1954]), he and others also stated that it would deny the Party a place on the ballot (100 Cong. Rec. 13837 [daily ed. August 16, 1954]; *id.* at 14082 [daily ed. August 17, 1954]). Since the right to appear on the ballot, whether for State or Federal office, depends on State law (U. S. Const., Art. I, § 4 and Art. II, § 1; *United States v. Gradwell*, 243 U. S. 476 [1917]; 18 AM. JUR., tit. *Elections* § 9 [1938]), it must necessarily have been the intention of Congress that state-granted rights be included within the proscription of section 3.

Senator Ferguson stated that under the Act the Party "would not be able to make any lease or hire people under contract * * *" or "enter into any contractual relations" (100 Cong. Rec. 14088 [daily ed. August 17, 1954]). Clearly, construing section 3 to embrace rights under State laws is in harmony with the obvious desire of Congress to enact as broad a deprivation as possible.

Furthermore, according to the argument of counsel for the Parties, the Communist Control Act does apply to Alaska and Hawaii because at the time of its enactment they were territories of the United States. Do the respondents now claim that since these territories have attained statehood the law no longer applies to them? And if it is admitted that the law continues to apply to them, what happens to the principle that all States are admitted to the Union upon an equal footing?

It seems obvious, also, from the context of the section, as a whole, that the laws, the benefit of which the petitioners have lost, are necessarily the laws of the *governments*, federal, state and territorial, which the petitioners threaten to overthrow. The fine splitting of hairs, the

raising of the issue whether the Nation was "made" from the States or *vice versa*, cannot obscure the intent so clearly expressed in the Statute.

2. Natural or inherent rights.

Petitioners make the point (Brief, pp. 17-18) that Section 3 of the Act does not purport to terminate all of their rights, but only those "which have heretofore been granted * * * by reason of the laws of the United States or any political subdivision thereof." They then assert that natural persons possess an inherent right to employ others and conclude that *if* the petitioners were natural persons their rights would not be among the rights terminated by the section.

But the fact of the matter is that the petitioners' conclusion is based upon an erroneous premise; although not considered legal entities at common law, unincorporated associations have been statutorily invested with certain powers and capacities which stamp them as artificial entities. They have, in some instances, been given power to act in their own names; in others, they must still act *through* natural persons. However, even in the latter cases the natural persons do not act in their own right; they are merely the conduits for the effectuation of the purpose sought to be accomplished.²⁵

Assuming, *arguendo*, that we were dealing with the "inherent rights" of natural persons, we must assume, since the petitioners have distinguished such rights from rights granted by the state (presumably, by statute), that such rights refer to those which were in existence under the common law. There is, of course, no national common law, operative as such, throughout the states of the Union. The adoption and application of the common law was a matter left to the several states for determination (*Hartley Pen*

²⁵ See footnote 24, *supra*, p. 43.

Co. v. Lindy Pen Co., 16 F. R. D. 141, 149 [D. C. Cal., 1954]; *In re Farley's Estate*, 63 Cal. App. 2d 130, 146 P. 2d 249, 251 [1944]; *Heineman v. Hermann*, 385 Ill. 191, 52 N. E. 2d 263, 266 [1944]; *Floyd v. Christian Church Widows and Orphans Home*, 296 Ky. 196, 176 S. W. 2d 125, 129 [1943]; *Caparell v. Goodbody*, 132 N. J. Eq. 559, 29 A. 2d 563, 570 [1942]; *North Carolina Corporation Comm. v. Citizens' Bank & Trust Co.*, 193 N. C. 513, 137 S. E. 587, 589 [1927]]. In New York the common law of England remains in force, except as modified by statute, by force of constitutional provision to such effect²⁶ (*People v. Morton*, 284 App. Div. 413, 414, 132 N. Y. S. 2d 302 [2d Dept., 1954], *affd.* 308 N. Y. 96, 123 N. E. 2d 790 [1954]).

In other words, by virtue of the constitutional provision the common law is included in that which is granted by the State. Literally, therefore, the provision of Section 3 which is quoted by the petitioners applies to *all* "rights, privileges and immunities" because the "laws of the United States or any political subdivision thereof" include the common law as well as the statute law of the states and all "rights, privileges and immunities" are "granted" by such laws since these terms describe the extent to which particular individual or group claims or interests are secured by law.

In any event, the use of the word "*granted*" in the clause which terminated the petitioners' rights, privileges and immunities is of no particular significance and may properly be equated with the clearly broader term "*attendant*" which appears in the prior clause in the same section—"The Communist Party of the United States, or any successors of such party . . . are not entitled to any of the rights, privileges, and immunities *attendant* upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof;

²⁶ See footnote 13, *supra*, p. 11.

• • •.” Clearly, it must have been the intention of Congress to terminate those rights, privileges and immunities to which it felt the petitioners were not entitled.

It must further be observed that the petitioners have urged that the “right to employ others” is a natural or inherent right. We are not here concerned either with the “right to employ others” or the general right to enter into contracts. We are concerned with the right to be an employer within the meaning of New York’s Unemployment Insurance Law.²⁷ That right, unquestionably, is the subject of a statutory grant.

3. Effect of continued existence.

The petitioners argue that the provisions of the Internal Security Act and Section 5 of the Communist Control Act evince a legislative intent not to terminate “the right of petitioners to have and to function through employees” (Brief, pp. 20-22) and in support thereof quote the Department of Justice in a brief submitted in *Communist Party v. Subversive Activities Control Board*.²⁸

The argument is predicated, however, on the obviously meaningless, inconsistent and stultifying assumption that Congress would destroy the petitioners in one section and recognize their continued viability in another. The fallacy in petitioners’ argument becomes apparent upon analysis of the statute. Congress has effectively destroyed the petitioners as *legal* entities. Nevertheless, Congress was aware that this might drive the movement underground and that it would continue on an illegal basis. This is

²⁷ It has previously been observed that the Unemployment Insurance Law of New York does not include all types of employment, even though unquestionably legal in character (agriculture, for example); *supra*, p. 43.

²⁸ No. 12—Oct. T., 1960. See footnote 26 in Petitioners’ Brief (p. 21).

mere recognition of the character of the movement and of the recent history of its operations.²⁹ Certainly, if the movement continued, as it has in the past, on a clandestine basis after purportedly voluntarily going out of existence, how much more likely is it that it will do so after being put out of business by force of law?

In any event, control by the Government is just as essential in the one case as in the other. The regulatory provisions of the Internal Security Act apply as well to operations outside the law as those within the law.³⁰

It is, moreover, unsound and illogical to argue that because the regulatory provisions of the Internal Security Act will have no scope if the activities sought to be regulated are prohibited by the Communist Control Act, the proviso in Section 3 of the latter act should be interpreted to authorize the petitioners to continue to assert, as a legal entity, the rights, privileges and immunities which have been expressly terminated.³¹

²⁹ In the Respondent's Brief in this Court in *Communist Party v. Subversive Activities Control Board*, No. 12—October Term, 1960, pp. 16-17, it was said: "The post-World War II revelations of widespread espionage and infiltration of sensitive government agencies in Canada, England, and the United States by Soviet agents, recruited from the membership of the domestic Communist parties in those countries showed more clearly the nature and dimensions of the danger. In addition, the evidence adduced at the trial and conviction in 1949 of the eleven leaders of the American Communist Party under the Smith Act, and the commencement of hostilities in Korea in June, 1950, furnished Congress with further reason to believe, in September 1950, when the Act in issue was passed, that the dissolution of the Communist International in 1943 had been a subterfuge and that there remained in existence a world Communist movement which endangered the security of the United States." (Emphasis added.)

³⁰ Illegal, as well as legal, operations are as much subject to regulation and control as they are subject to tax (*Wainer v. United States*, 299 U. S. 92, 93 [1936], *infra*, p. 55).

³¹ Cf. the taxation of gains from illegal operations and the payment of license taxes upon businesses prohibited by law. See pp. 54-56, *infra*.

4. Obligations and duties.

The respondent argues, and he has been upheld by the Court below (37), that whatever rights, privileges and immunities the petitioners may have had, were terminated by the Communist Control Act. In the dissenting opinion in the Court below Judge FULD held (43-44), and the petitioners here urge (Brief, pp. 14-16), that the requirement to pay an unemployment insurance tax is a liability imposed upon them and not an "immunity or right" within the Act.

It seems clear that in the very nature of the matter an *obligation or duty* to pay a tax cannot be considered a *right, privilege or immunity*. But the relevant and crucial point involved herein is whether the *right to be a registered employer* was terminated by the Act.

The correlative of the right to be such an employer is the obligation to pay the tax, but the latter is merely the tail which should not be permitted to wag the dog. As well might it be argued that the obligation to pay an income tax is determinative of the right to earn income, or to push the analogy to an even greater extreme, the obligation to pay an estate tax is determinative of the right to pass title by will or descent.

Furthermore, it is settled law that the obligation to pay a tax is not dependent upon the legality of the transaction upon which the tax is based. Thus, in *Rutkin v. United States*, 343 U. S. 130 (1951), the Court said (p. 137):

"There has been a widespread and settled administrative and judicial recognition of the taxability of unlawful gains of many kinds under § 22(a). *Johnson v. United States*, 318 U. S. 189 (money paid to a political leader as protection against police interference with gambling); *United States v. Sullivan*, 274 U. S. 259 (illicit traffic in liquor); *Humphreys v. Commis-*

sioner, 125 F. 2d 340 (protection payments to racketeer and ransom paid to kidnapper); *Chadick v. United States*, 77 F. 2d 961 (graft); *United States v. Comerford*, 64 F. 2d 28 (bribes); *Patterson v. Anderson*, 20 F. Supp. 799 (unlawful insurance policies); *Petit v. Commissioner*, 10 T. C. 1253 (black market gains); *Droge v. Commissioner*, 35 B. T. A. 829 (lotteries); *Rickard v. Commissioner*, 15 B. T. A. 316 (illegal prize fight pictures); *McKenna v. Commissioner*, 1 B. T. A. 326 (race track bookmaking)."

In *Angelus Building & Investment Co. v. Commissioner of Internal Revenue*, 57 F. 2d 130 (9th Cir., 1932), cert. den. 286 U. S. 562 (1931), it was said (p. 132):

"[I]ncome derived from an unlawful business may be made to pay its toll in taxes in the same percentages as that which is reaped from legitimate enterprises."

Certainly, it would be specious reasoning to conclude from the foregoing that the collection of the tax constitutes tacit approval of the transactions from which the obligation to pay the tax arose. The obvious conclusion to be drawn from the dissenting opinion in the Court below is that since the Communist Party has not been expressly exempt from the payment of the tax, it is therefore, licensed to engage in transactions which have been forbidden by law. But this, too, has been settled adversely to the view of the dissenters below. Thus, in *Wainer v. United States*, 299 U. S. 92 (1936), the Court said (p. 93):

"The difficulty of paying the excise upon the privilege of carrying on a business which is prohibited does not preclude the prescription of sanctions for non-payment. Petitioners insist it is a contradiction in terms to say the laws of the United States at the same time prohibit and license an occupation. The contention is based on misconception of the nature of the exaction. The United States has not licensed the liquor business but, as is clearly within its power, has laid an excise upon the doing of the business whether lawfully or unlawfully conducted."

And even more forthrightly it was said in *State ex rel. Replagle v. Joyland Club*, 124 Mont. 122, 220 P. 2d 988, 999 (1950):

"The payment of a license or tax upon a business prohibited by statute is no justification for doing the forbidden act."

To the same effect, see *Commonwealth ex rel. Gilmér v. Smith*, 193 Va. 1, 68 S. E. 2d 132, 136 (1951); *Stein v. State Tax Comm.*, 266 Ky. 469, 99 S. W. 2d 443, 445 (1936); *Lueke v. Mescall*, 272 Ky. 770, 115 S. W. 2d 358 (1938).

As Judge VAN VOORHIS said in his partial concurrence in the Court below (45):

"Taxation does not make it legal (*United States v. Yuginovitch*, 256 U. S. 450, 462; *United States v. Stafoff*, 260 U. S. 477, 480; *United States v. One Ford Coupe*, 272 U. S. 321, 326)."

It seems obvious that the essential test determining taxability is the prerequisite of coverage of the employer under the Unemployment Insurance Law; coverage cannot arise simply upon the basis of payment of the tax. Indulgence of the latter rule constitutes placing the cart before the horse.

POINT II

Congress had the constitutional power to enact the Communist Control Act.

The petitioners have asserted that Congress had no power to enact the Communist Control Act because they were dealing with rights granted by state law which do not substantially affect interstate commerce (Brief, pp. 19-20, 33). But the power of Congress to act is founded on a much broader and more relevant base than

the control of interstate commerce. The Federal Government, through Congress, has a constitutional right to act, not only in its own behalf, but also in behalf of the several States. This is made clear, not as a substantive grant of power, but as descriptive of the purposes of the Constitution, in the Preamble to the Federal Constitution, where it is said:

"We, The People of the United States, in Order to * * * insure domestic Tranquility, * * * provide for the common defence, * * * do ordain and establish this Constitution for the United States of America."

The substantive constitutional grant of power is found in Art. I, Sec. 8, Cl. 1, which provides:

"The Congress shall have Power To * * * provide for the common Defence * * * of the United States; * * *."

The substantive constitutional grant of power is further found in Art. IV, Sec. 4, which provides:

"The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; * * *."

With respect to Congressional action providing for the common defense, it was said in *United States v. Peace Information Center*, 97 F. Supp. 255 (Dist. of Col., 1951), at page 261:

"The power of Congress to legislate concerning the national defense includes power to declare war, to raise and support armies, to provide and maintain a navy, as well as the power to make all laws necessary and proper for carrying into execution the foregoing powers. These powers necessarily include authority to take preventive measures against activities that may cause international misunderstandings, which, in turn, may lead to war, as well as against endeavors to subvert, undermine, or overthrow the government." (Emphasis added.)

And in *Farmer v. Rountree*, 149 F. Supp. 327 (U. S. D. C., M. D. Tenn., 1956), aff'd 252 F. 2d 490 (6th Cir., 1958), cert. den. 357 U. S. 906 (1958), the Court said (p. 329):

"Courts are constituted to adjudicate cases and controversies properly coming within the judicial sphere of action. They have no right or authority to resolve political or governmental questions, or to review issues of governmental policy entrusted to the executive and legislative departments.

• • • It [i.e., Congress] has, as it must necessarily have, the authority exclusive of any court, to determine the requirements of national defense, • • •

The foreign policy of the United States is the exclusive province of the executive and the legislative branches of government, and in this area of responsibility, as well as in all questions of national defense, it is imperative that courts strictly observe the limitations upon their power and refrain from rendering any judgment which would embarrass the policy decisions of government or involve them in confusion and uncertainty."

Upon appeal to the Court of Appeals, the latter Court said (p. 491):

"The claims set forth in the complaint, however, involved political and governmental questions which are confided by the Constitution to the legislative and executive branches of the government, and over which the courts have no jurisdiction.

• • •

All of these contentions were fully considered and determined in the opinion of Judge William E. MILLER, reported in D. C. 149 F. Supp. 327, with which we concur; and the judgment of the district court is, accordingly, affirmed for the reasons set forth in that opinion."

The broadest statement of the concept which underlies the exercise of legislative power in the respect here involved was set forth in *Teget v. Lambach*, 226 Iowa 1346,

286 N. W. 522, 123 A. L. R. 392 (1939). The Court said (p. 1350):

"It has never been a part of the policy of this or any other state or sovereign to place limitations upon the power and means of maintaining its own existence."

Insofar as the power of Congress is based upon Art. IV, Sec. 4, reference may be had to *Oil Workers International Union v. Elliott*, 73 F. Supp. 942 (N. D. Texas, 1947), wherein it was said (p. 944):

"The powers of Congress are outlined and defined by the Constitution of the United States. Section 4, Article 4, I believe it is, which provides that the National Government shall guarantee to each state a Republican form of Government. It is recognized that the Communistic form of government is not a representative form of government. Ours is a representative form of government, whereby the representatives of the people chosen by the people, determine the policies of the nation. In the Communistic form, you have more of the dictatorial type. It nowhere has functioned except by and in the hands of a dictator, therefore, it behooves the National Government to curb the growth of any system that would destroy representative government and bring about government by force."

In *Dunne v. United States*, 138 F. 2d 137 (8th Cir., 1943), cert. den. 320 U. S. 790 (1943), an anti-subversive federal statute was attacked upon the ground of lack of legislative power. The Court said (p. 140):

"Appellants state that 'This statute must seek its validating force in the vague and undefined "right of self-preservation."' No such extremity exists. The statute is grounded upon specific Constitutional grants of power. The Preamble, setting forth the purposes of the Constitution, includes to 'insure domestic Tranquility' and to 'provide for the common defence,' as well as to 'secure the Blessings of Liberty.' Article I, § 8, cl. 1 specifically grants to Congress the power to

'provide for the common Defence.' Clauses 12 to 16 grant the specific powers 'to raise and support Armies,' 'to provide and maintain a Navy,' 'to make Rules for the Government and Regulation of the land and naval Forces,' and covering the Militia. Clause 18 grants the power 'To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers.' Article IV, § 4 is 'The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion,' and, upon application, 'against domestic Violence.' Thus, the Constitution expresses clearly the thoughts that the life of the Nation and of the States and the liberties and welfare of their citizens are to be preserved and that they are to have the protection of armed forces raised and maintained by the United States with Power in Congress to pass all necessary and proper laws to raise, maintain and govern such forces."

And, of course, if it has the right to inquire, it has the concomitant right to act, legislatively, upon the results of its inquiry. This was affirmed in *Commonwealth v. Nelson*, 377 Pa. St. 58, 104 A. 2d 133 (1954), aff'd 350 U. S. 497 (1956) as follows (p. 69):

"[T]he duty of suppressing sedition within a State rests directly upon the Federal government by virtue of Article IV, § 4, of the Constitution which charges the National Government with the duty of guaranteeing 'to every State in this Union a Republican Form of Government.'"

Aside from the question of constitutional capacity to enact a law such as that involved herein, it should be noted that the right so to act is without constitutional limitation and is not judicially reviewable. Thus, in *Ohio v. Akron Park District*, 281 U. S. 74 (1930), this Court said (pp: 79-80):

"As to the guaranty to every State of a republican form of government (Sec. 4, Art. IV), it is well settled that the questions arising under it are political, not

judicial, in character and thus are for the consideration of the Congress and not the courts. *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U. S. 118; *O'Neill v. Leamer*, 239 U. S. 244, 248; *State of Ohio ex rel. Davis v. Hildebrant, Secretary of State of Ohio*, 241 U. S. 565; *Mountain Timber Co. v. State of Washington*, 243 U. S. 219, 234."

See, also *Highland Farms Dairy v. Agnew*, 300 U. S. 608, 612 (1937).

From the foregoing it is obvious that Congress had the Constitutional power and duty to enact the Communist Control Act and that its right to act under the stated constitutional authorizations is not reviewable by the Court.

A. Federal Inaction.

Federal inaction under the Act, on administrative or other levels, does not impugn the viability of the Act nor militate against its legal efficacy. It requires no citation of authorities to support the proposition that where a statute is concededly vague and ambiguous in its terms resort may be had to the practical construction thereof as revealed by the action of those in whom the power of enforcement of the statute is reposed. But the Communist Control Act is clear and unambiguous in its terms; it is self-executing; it is not in need of further statutory implementation, either Federal or State (*Salwen v. Rees*, 16 N. J. 216, 108 A. 2d 265 [1954]; *Pennsylvania v. Nelson*, 350 U. S. 497, 504 [1956]³²).

Although the argument is made that it is inconsistent to rely on the Federal policy of outlawing the Party and yet ignore the absence of Federal action denying the Party its status under the Federal Unemployment Insurance Law, it must be recognized that in the case at bar interpretation

³² See quotation from the cited case at p. 63, *infra*.

and application of the Communist Control Act, devolved upon the State in the absence of a clear expression of policy by Federal administrative authorities or interpretation of the Act by this Court. Failure of the Federal authorities to take action or otherwise test the meaning or validity of the Act need not be construed as a declaration of a Federal policy concerning the Party's status as an employer.³³ Moreover, the Federal policy seems to have been quite clearly and explicitly enunciated by Congress itself.

POINT III

The Communist Control Act is constitutional.

The Court of Appeals stated (38):

"We accept none of the arguments that this Federal Communist Control Act is unconstitutional."

Judge FULD, in his dissenting opinion, avoided the issue of constitutionality, stating that there was no necessity for considering it (40). He disposed of the matter on a question of interpretation. The Appellate Division, too, although interpreting the Act adversely to the respondent, construed the Act upon an implicit assumption of constitutionality, saying (34):

"No doubt the State of New York could take steps in this direction [i.e., destroy the Parties' ability to perform certain functions of existence] as it might deem warranted."

Later it said (35):

"We do not hold that the State may not prevent the Communist Party from engaging in any activity of existence."

³³ The Court below said: "What the reason is for this position [i.e., Federal inaction] we do not know and there is not enough in the record to prove any binding Federal administrative construction of the Federal act" (38).

In the only case thus far reported in which the question arose the Act was held constitutional. In *Salwen v. Rees*, 16 N. J. 216, 108 A. 2d 265 (1954), the Court affirmed for the reasons stated by Judge DREWEN in the Court below. Judge DREWEN had delivered an oral opinion, in which he said (p. 216):

"The court fundamentally is asked to declare unconstitutional an act of Congress known as the Communist Control Act of 1954 [50 U. S. C. A. § 841 *et seq.*]. The court declines to do so."

While the highest Court of the State of New Jersey has *directly and categorically* held the Act to be constitutional, it should be noted that this Court implicitly held the Act to be constitutional in *Pennsylvania v. Nelson*, 350 U. S. 497 (1956). In that case the Court held that by the enactment of the Smith Act, the Internal Security Act of 1950 and the Communist Control Act of 1954, the Federal Government pre-empted the field of prosecutions for sedition. This Court said with respect to these federal statutes (p. 504):

"Looking to all of them in the aggregate, the conclusion is inescapable that Congress has intended to occupy the field of sedition. Taken as a whole, they evince a congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it. Therefore, a state sedition statute is superseded regardless of whether it purports to supplement the federal law."

Of crucial importance to this case is the fact that the determination in the *Nelson* case was based on the Congressional plan which included the Communist Control Act. Implicit in the acceptance of this plan, as determinative of its conclusion, was the acceptance by the Court of the validity of all elements of the Congressional plan. The Communist Control Act stands approved by this Court.

A. Bill of Attainder and *Ex Post Facto* Law.

It is asserted by the petitioners that the Act results in the outlawry of the Communist Party and constitutes a bill of attainder and an *ex post facto* law.

A bill of attainder is generally described as a legislative act which imposes punishment upon a named individual or an easily ascertainable group without a judicial trial (*United States v. Lovett*, 328 U. S. 303, 315 [1946]; *Cummings v. Missouri*, 4 Wall. 277, 323 [1867]). The *ex post facto* provision of the Constitution forbids penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment, but does not apply to legislation imposing civil disabilities (*Harisiades v. Shaughnessy*, 342 U. S. 580 [1952]).³⁴ The debates in the federal convention upon the Constitution show that the term "*ex post facto* laws" was understood in a restricted sense relating to criminal cases only (*Bugajewitz v. Adams*, 228 U. S. 585 [1913]; see also *Carpenter v. Pennsylvania*, 17 How. 463 [1855], and *Johannessen v. United States*, 225 U. S. 227 [1912]).

Although Section 3 of the Act does not provide for a judicial trial to determine the culpability of the organiza-

³⁴ See *Trop v. Dulles*, 356 U. S. 86 (1958), in which the Chief Justice said (p. 96): "If the statute imposes a disability for the purpose of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature."

See also *Flemming v. Nestor*, 363 U. S. 603, 613-616 (1960), and the opinion of Mr. Justice FRANKFURTER in *DeVau v. Braisted*, 363 U. S. 144, 160 (1960).

tions within its scope, it cannot be said that the deprivations provided for constitute "punishment". There cannot be said to be "punishment" because the legislation does not evince a penal intent. The view that "penal intent" must be shown is supported by the purpose and judicial development of the prohibition against bills of attainder. The constitutional injunction against this type of statute was designed to maintain the separation of the legislative and judicial functions and thereby preserve to the individual the traditional safeguards of a judicial trial. Those safeguards are denied when the legislature exceeds its proper function of defining crime and purports to judge those guilty of the crime.

The Courts have regarded certain classes of facts as establishing a legislative penal intent. One such situation was where the legislature candidly stated its purpose (See concurring opinion of Mr. Justice FRANKFURTER in *United States v. Lovett*, 328 U. S. 303, 318 [1946]). Courts have also found penal intent where the characteristic causing persons to be disqualified was irrelevant to the activity from which they were excluded (See *Cummings v. Missouri*, 4 Wall. 277, 319-320 [1867]; *Pierce v. Carskadon*, 16 Wall. 234 [1872]. Cf. *Dent v. West Virginia*, 129 U. S. 114, 128 [1889]). Even where relevancy existed courts have discovered penal intent when the legislature imposed a disqualification after consideration of evidence as to the character of the proscribed individuals (*United States v. Lovett*, 328 U. S. 303 [1946]; cf. *Ex parte Garland*, 4 Wall. 333 [1867]). However, in contrast to this latter type of case in which the legislature's action makes clear that it is judging individuals or groups and deciding that they are deserving of punishment, there is the situation, as in the case at bar, in which the legislature disqualifies a class

from certain rights or privileges without intending to penalize the individuals who may fall into that class. For example, in *Hawker v. New York*, 170 U. S. 189 (1898), where the Supreme Court upheld a statute prohibiting felons from practicing medicine, the legislature manifestly was not assessing the character of individuals and then imposing a penalty upon them; it was not at all concerned with the persons who were or might become members of that class. Rather it was enacting a statute on the basis of "general human experience" as to the characteristics of that class (*Hawker v. New York*, *supra*, pp. 195-196; see also, *Dent v. West Virginia*, *supra*).

Even though there is a legislative investigation into the character of individuals or groups and a disqualification on the basis of the legislature's implicit determination of culpability, recent cases require that the proscription have retroactive application in order to constitute punishment (See *Garner v. Board of Public Works*, 341 U. S. 716 [1951]; *American Communications Association, C.I.O. v. Douds*, 339 U. S. 382, 413-414 [1950]; *Albertson v. Millard*, 106 F. Supp. 635 [1952], *revd.* on another ground and *remanded* 345 U. S. 242 [1952]; *Huntamer v. Coe*, 40 Wash. 2d 767, 246 P. 2d 489 [1952]).

In *American Communications Association, C.I.O. v. Douds*, *supra*, this Court upheld section 9(h) of the NLRA, which restricted the opportunity of Communists to serve as union officials by denying unions the advantages of the NLRA if their officers refused to take a non-Communist oath. The Court emphasized that this section was prospective in character, since individuals could serve as union officials merely by renouncing membership in the Party. It, therefore, found that Congress was not imposing pun-

ishment for past conduct, but was merely preventing further disruption of interstate commerce.

In the case at bar, too, a like result must ensue. The Act does not inflict punishment of any character, and if it be held that punishment is inflicted, it is clear beyond any doubt that it is not imposed by reason of any past conduct. Recognizing the *continuing* criminal character of the Party,³⁵ the Act provides for inability to assert in the future any rights, privileges and immunities in connection with transactions which take place subsequent to the effective date of the Act.

Aside from the proposition that the Act does not constitute a bill of attainder, there is a serious question as to whether an *organization* can be the subject of a bill of attainder (See the concurring opinion of Mr. Justice BLACK in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 144 [1951]). In this connection it may be observed that there are two constitutional sources for the claimed privileges and immunities—the 14th Amendment and Article IV, § 2. Under the 14th Amendment, § 1:

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; * * *.”

(The privileges and immunities involved in this provision are enumerated in the *Slaughterhouse Cases*, 16 Wall: 36 [1873].) Under Article IV, § 2:

“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”

³⁵ Actually, the Act did not render the petitioners illegal. They were already illegal. (See pp. 39-41; *supra*.) The Act merely recognized an existing fact and was, in effect, declaratory of such fact.

(The privileges and immunities involved in this provision are enumerated in *Corfield v. Coryell*, 6 Fed. Cas. 546, No. 3230 [C.C.E.D., Pa., 1823]; see also *Hague v. C.I.O.*, 307 U. S. 496, 511 [1939].)

Neither of these provisions, however, is applicable to the Communist Party. By their terms they apply to "citizens" of the United States and the States; numerous decisions have held that only natural persons are to be considered citizens under these provisions (*As to 14th Amendment—Hague v. C.I.O.*, 307 U. S. 496 [1939]; *Western Turf Ass'n v. Greenberg*, 204 U. S. 359 [1907]; *The Insurance Co. v. New Orleans*, 13 Fed. Cas. 67, No. 7052 [1870]. *As to Art. IV, § 2—Asbury Hospital v. Cass County*, 326 U. S. 207 [1945]; *Hemphill v. Orloff*, 277 U. S. 537 [1928]; *Paul v. Virginia*, 8 Wall. 168 [1868])).

B. Due process.

The petitioners assert that they have been deprived of a hearing and that the "facts" which are supposed to support the deprivation are found by legislative fiat. But, as has been heretofore stated, the Industrial Commissioner was under no burden to adduce evidence respecting the nature and character of the Communist Party; he could rely on the doctrine of judicial notice³⁶ or he could rely on the Congressional findings in the Communist Control Act,³⁷ or both. However, it must be made clear that the petitioners have not been deprived of an opportunity to be heard. Ample opportunity was afforded them to submit such evidence as they wished with respect to the nature and character of the Party but they failed to avail them-

³⁶ *Supra*, pp. 23 *et seq.*

³⁷ *Supra*, pp. 36 *et seq.*

selves of the proffered opportunity. They must be deemed to have waived this objection.

Despite the proscription set forth in the Act, broad as it is, there is nothing in the Act which deprives the Party of substantive due process when action is brought against it to terminate a right which it claims. It is precisely that which is taking place in the case at bar. The petitioners were afforded the opportunity at the hearings herein to oppose the termination of their rights. Neither the Industrial Commissioner, nor the Referee or the Appeals Board denied them the right to present their case. And the statute, itself, does not deny them that right.

So far as procedural due process is concerned, they received notice of the action of the Commissioner and they received notice of all proceedings to review the action of the Commissioner.

It is submitted that there has been no violation of due process, either substantive or procedural. It is further submitted, however, even if it be held that there is a denial of due process, that such denial would be proper, as consonant with a basic postulate which underlies the due process provision—movements seeking to crush freedom need not be tolerated. (Mr. Chief Justice HUGHES, in *Principality of Monaco v. Mississippi*, 292 U. S. 313, 322 [1934], expressed the admonition that behind “the words of the constitutional provisions are postulates which limit and control”).³⁸ Under our constitutional structure, even as orthodox a concept of democracy as that of “majority rule” must yield where a change would endanger the democratic character of the government. This basic postulate must necessarily

³⁸ See footnote 40, *infra*, pp. 72-73.

control due process. No one will maintain that the establishment of a totalitarian dictatorship in the United States by an amendment to the Constitution would not upset the basic scheme of things embodied in the Constitution as much as an amendment depriving certain states without their consent of their equal representation in the Senate (which Article V expressly prohibits). No democratic or constitutional principle is violated, therefore, when a democracy acts to exclude those groups from entering the struggle for political power which, if victorious, will not permit the struggle to continue in accordance with the democratic way.

During the period since World War II international Communism, while halted at some points, has made great gains and the increasing strength of the Soviet world places us in constant peril. *Internal* subversion has been the main weapon by which Communist victories have been won in many foreign countries. It now threatens the stability of still other countries. Recognizing the implications of this to our allies and Nato, the Federal Government is striving to meet the *external* threat. Recognizing also the ever-present *internal* threat, Congress, the Executive and the States have persistently, by legislation and security programs, attempted to combat Communism at home.

The Courts, generally, have refused to contrive the Bill of Rights so as to interfere with a reasonable legislative judgment of what laws are essential to national security. This is as it should be for without observance of the primary duty of self-preservation, the civil liberties of the individual would be meaningless for they must, under such circumstances, succumb to the totalitarian regime which

must inevitably follow.³⁹ If our government is to survive, it must defend itself, not only in preparation for external war for which men are still being drafted and sent to foreign lands, but we must prepare in advance against the dangerous preliminary attacks on our internal security, which are the peculiar technique of the Communist conspiracy and the prelude to war.

It is submitted that the Constitution should be construed in accordance with its purpose and *as one instrument*. Pre-occupation with or emphasis upon one part of the Constitution and the ignoring of another equally important part, so as to endanger national survival, constitutes an unrealistic and improper method of applying constitutional standards and principles.

The greatest difficulty in recent years has been with respect to the situation wherein the right to assert infringement of civil liberties and the right of the government to resist violence seem to meet. There is required a deeper analysis of violence and non-violence and their relation to liberal democracy. In the *Dennis* and *Yates* cases, *supra*, this Court affirmed "the basic premise of our political system—that change is to be brought about by non-violent constitutional process." No government can assure a "right" of violent overthrow; the guaranty and the right

³⁹ "As for the legal system which the Communist Party, U. S. A. visualizes for post-revolutionary America, William Z. Foster has written: 'The civil and criminal codes would be simplified, the aim being to proceed directly and quickly to a correct decision * * *. The courts will be class-courts, definitely warring against the enemies of the toilers.' Such a legal system, in short, would naturally conduct trials as they have been conducted in the Soviet Union and the satellites, with no 'hypocrisy' about 'due process'; and all that we have cherished as the *Magna Carta* tradition would be destroyed as 'historically obsolete'." (OVERSTREET, *What We Must Know About Communism* [1st Ed.], page 228, quoting WM. Z. FOSTER, *Toward Soviet America* [1932], p. 273).

are mutually abhorrent. Certain political philosophers to the contrary notwithstanding, violent revolution exists *outside* rather than *inside* the law. Therefore, if the Communist Party is a conspiracy for the violent overthrow of the government, its advocacy of such violence colors its every act and it is not protected under the Bill of Rights.

C. First Amendment.

The basic postulate, discussed above with respect to due process, is a limiting factor also upon the operation of the First Amendment relating to the rights of free speech and assembly.⁴⁰ The point involved was well expressed in

⁴⁰ In a discussion of the Communist Control Act in 23 *Univ. of Chicago Law Review* 173, 188-189 (1956; Carl A. Auerbach, *Communist Control Act of 1954*), supporting the thesis that we need not tolerate the intolerant, it is said:

"Mill's classic argument, the eloquent statement of Judge Learned Hand and Professor Stone's formulation [regarding the absolute character of the guaranty of free speech and press] must all assume, it seems to me, one 'impregnable' absolute—freedom itself. For if the theory that there are no political orthodoxies is taken to mean that we must also be skeptical about the value of freedom and therefore tolerate freedom's enemies, it will tend to produce, in practice, the very absolutism it was designed to avoid—as experience with modern totalitarianism demonstrates. When, therefore, Mill says that 'we can never be sure that the opinion we are endeavoring to stifle is a false opinion,' he could not consistently have been referring to the opinion that freedom of opinion itself should be suppressed. There is a passage in *On Liberty* which, I think, supports this inference and has significance for our contemporary problem. Asking whether the law should enforce an agreement under which an individual sells himself, voluntarily, as a slave, Mill says no and argues: 'The reason for not interfering, unless for the sake of others, with a person's voluntary acts, is consideration for his liberty. * * * But by selling himself for a slave, he abdicates his liberty; he foregoes any future use of it, beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification for allowing him to dispose of himself. * * * The principle of freedom cannot require that he should be free not to be free. It is not freedom, to be allowed to alienate his freedom.'

(Footnote continued on following page)

Communist Party of United States v. Subversive Activities Control Board, 223 F. 2d 531 (App. D. C., 1954), *revd.* and remanded on another ground 351 U. S. 115 (1956), in which it was said (p. 544):

"The right to free expression ceases at the point where it leads to harm to the Government. The epigram which has become classic as a designation of that point is 'clear and present danger.' When danger to government is clear and present, the right of unrestricted speech gives way as do other basic rights of liberty and life. * * *

The activities of a world Communist movement such as that described in this statute and of organizations in this country devoted to its objectives constitute a clear and present danger within the meaning of any definition of the point at which freedom of speech gives way to the requirements of government security."

This Court has, itself, consistently held that, although the language of the First Amendment seems to impose an absolute limitation upon Congressional power to sanction speech, press and peaceable assembly, these rights are not without limitation (*Debs. v. United States*, 249 U. S. 211 [1919]; *Frohwerk v. United States*, 249 U. S. 204 [1919];

(Footnote continued from preceding page)

So, in suppressing totalitarian movements a democratic society is not acting to protect the *status quo*, but the very same interests which freedom of speech itself seeks to secure—the possibility of peaceful progress under freedom. That suppression may sometimes have to be the means of securing and enlarging freedom is a paradox which is not unknown in other areas of the law of modern democratic states. The basic 'postulate', therefore, which should 'limit and control' the First Amendment is that it is part of the framework for a constitutional democracy and should, therefore, not be used to curb the power of Congress to exclude from the political struggle those groups which, if victorious, would crush democracy and impose totalitarianism. Whether in any particular case and at any particular time, Congress should suppress a totalitarian movement should be regarded as a matter of wisdom for its sole determination. But a democracy should claim the moral and constitutional right to suppress these movements whenever it deems it advisable to do so."

Schenck v. United States, 249 U. S. 47 [1919]; *Schaefer v. United States*, 251 U. S. 466 [1920]). It has, in fact, specifically held in *American Communications Assn., C. I. O. v. Douds*, 339 U. S. 382, 394 (1950), that the exercise of First Amendment freedoms may be restricted to protect other vital interests of the Government. See also *Barenblatt v. United States*, 360 U. S. 109 (1959), where this Court said (p. 126):

“Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.”

The law is filled with examples of statutes which place restraints on freedom of speech or of the press, but which are nevertheless valid because the statute's objective lies within the power of Congress to accomplish, and the restraint is a necessary and appropriate concomitant of the exercise of the power. The Hatch Act validly forbids officers and employees in the executive branch of the Federal Government from taking an active part in political campaigns,⁴¹ notwithstanding the obvious restraints imposed by the prohibition on such officers' and employees' freedom of speech and political expression (*United Public Workers v. Mitchell*, 330 U. S. 75, 94-104 [1947]). The Federal Regulation of Lobbying Act⁴² validly requires all “those who for hire attempt to influence legislation or who collect or spend funds for that purpose” to spread on the record pertinent information as to “who is being hired, who is putting up the money, and how much,” notwithstanding the incidental inhibitory effect of this require-

⁴¹ Act of August 2, 1939, c. 410, § 9; 53 Stat. 1148; 5 U. S. Code 1181.

⁴² Act of August 2, 1946, c. 753, Title III, §§ 305, 307-308; 60 Stat. 840-842; 2 U. S. Code 246, 266-267.

ment on the exercise of First Amendment freedoms (*United States v. Harriss*, 347 U. S. 612, 625-626 [1954]). The Federal Corrupt Practices Act validly requires all political committees which accept contributions or make expenditures for the purpose of influencing national elections to keep exact accounts of all such contributions and to report publicly the names and addresses of all contributors as well as of persons to whom such expenditures are made,⁴³ though here, too, the requirement unquestionably imposes restraints upon freedom of political expression (*Burroughs v. United States*, 290 U. S. 534 [1934]).

The unfair-labor-practice provisions of the National Labor Relations Act⁴⁴ have led to certain valid restrictions on free speech (*National Labor Relations Board v. Virginia Elec. & Power Co.*, 314 U. S. 469 [1941]; *National Labor Relations Board v. Falk Corp.*, 308 U. S. 453 [1940]). Newspaper publishers are subject to regulation in the public interest, notwithstanding possible restrictive effects on their freedom to publish (*Associated Press v. National Labor Relations Board*, 301 U. S. 103, 130-133 [1937]; *Associated Press v. United States*, 326 U. S. 1, 19-20 [1945]; *Mabee v. White Plains Publishing Co.*, 327 U. S. 178, 184 [1946]; *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 192-193 [1946]; *Lorain Journal Co. v. United States*, 342 U. S. 143, 155-156 [1951]). Radio Broadcasting stations engaging in certain practices can be denied licenses without unlawfully entrenching on First Amendment rights, despite the restraint on freedom of speech which may result from such denials (*National Broadcasting Co. v. United States*, 319 U. S. 190, 226-227 [1943]).

⁴³ Act of Feb. 28, 1925, c. 368, Title III, §§ 302-305; 43 Stat. 1070-1072; 2 U. S. Code 241-244.

⁴⁴ Act of July 5, 1935, c. 372, § 9(h), as amd. by Labor Management Relations Act of June 23, 1947, c. 120, § 101; 61 Stat. 146.

Likewise, the Foreign Agents Registration Act⁴⁵ validly requires agents of foreign principals to register with the Attorney General and to submit detailed information relating to the agency relationship (*United States v. Peace Information Center*, 97 F. Supp. 225, 261-263 [D. D. C., 1951]; see also *Vierick v. United States*, 318 U. S. 236, 241 [1943], where the constitutionality of the Act was assumed). The National Labor Relations Act, as amended by the Labor Management Relations Act⁴⁶ validly denied the benefits of that Act to labor organizations unless each officer took an oath that he was not a member of the Communist Party (*American Communications Ass'n, C. I. O. v. Douds*, 339 U. S. 382, 389-412 [1950]). The postal laws⁴⁷ validly require the publishers of newspapers and magazines, as a condition of their use of second-class mail facilities, publicly to disclose the names of the owners of these publications and to mark with the word "advertisement" all contents the insertion of which has been paid for (*Lewis Publishing Co. v. Morgan*, 229 U. S. 288 [1913]).

In all these and similar cases, the question was not whether some indirect, incidental restraint on complete freedom of speech or of the press might result from the enforcement of the law enacted by the legislature. That there would be some such restraint was apparent. The question was whether the objective of the legislature was one within its power to effect and, if so, whether the restraint was appropriate and reasonable under all the circumstances, including the end sought to be achieved by the law. As this Court described the problem in an anal-

⁴⁵ Act of June 8, 1938, c. 327; 52 Stat. 631-633; 22 U. S. Code 611 *et seq.*

⁴⁶ See footnote 44, *supra*.

⁴⁷ Act of August 24, 1912, c. 389, § 2; 37 Stat. 553; 39 U. S. Code 233, 234.

ogous context in *American Communications Ass'n, C. I. O. v. Douds*, *supra*, 339 U. S. at p. 400:

" * * * In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by § 9(h) pose continuing threats to that public interest when in positions of union leadership. We must, therefore, undertake the 'delicate and difficult task * * * to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.' "

D. Tenth Amendment.

The Tenth Amendment has no bearing upon the exercise of Congressional power in enacting the Communist Control Act because Congress acted well within its jurisdiction under the constitutional provisions for the "common defense" and the guaranty to every State of a republican form of government.⁴⁸

The Tenth Amendment does not impose any limitations on the powers of the Federal Government (*Case v. Bowles*, 327 U. S. 92, 101-102 [1946]; *Fernandez v. Wiener*, 326 U. S. 340, 362 [1945]; *United States v. Darby*, 312 U. S. 100, 123-124 [1941]). It merely gives doctrinal body to an objection that Congress has no power to act at all in certain areas. It "states but a truism that all is retained which has not been surrendered" (*United States v. Darby*, *supra*). Thus, if Congress has power to act in a given area, no valid objection can be raised because of the fact that it thereby enters a field which ordinarily has been regulated by the States (*Case v. Bowles*, *supra*; *Bowles v.*

⁴⁸ See Point II, *supra*, pp. 56 et seq.

Willingham, 321 U. S. 503, 521-523 [1944, concurring opinion of Mr. Justice RUTLEDGE]; *United States v. Darby*, *supra*, at 114, 123-4; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 156 [1919]).

POINT IV

The action of the State, pursuant to the mandate of the Communist Control Act, did not result in a violation of the Fourteenth Amendment.

The petitioners have asserted that the action of the respondent in refusing to accept unemployment insurance taxes from petitioners and in suspending them as contributing employers under the New York Unemployment Insurance Law denied them due process of law and the equal protection of the laws in violation of the Fourteenth Amendment (Brief, pp. 33-38).

Preliminarily, it needs to be observed that the law is well settled that the petitioners, as artificial entities, have no legal standing to voice such objection. The rule was reiterated by this Court in *Hague v. C. I. O.*, 307 U. S. 496 (1939) as follows (p. 514):

“Natural persons, and they alone, are entitled to the privileges and immunities which § 1 of the Fourteenth Amendment secures for ‘citizens of the United States.’ (*Orient Insurance Co. v. Daggs*, 172 U. S. 557; *Holt v. Indiana Manufacturing Co.*, 176 U. S. 68; *Western Turf Ass’n. v. Greenberg*, 204 U. S. 359; *Selover Bates & Co. v. Walsh*, 226 U. S. 112).⁴⁹

Insofar as the petitioners predicate a violation of the Fourteenth Amendment on an alleged lack of a hearing, they are faced with a record showing the contrary fact.

⁴⁹ See also pp. 67-68, *supra*.

As has been heretofore stated,⁵⁰ the respondent was under no burden, in establishing a *prima facie* case, of adducing evidence respecting the nature and character of the Communist Party; he could rely on the doctrine of judicial notice, or he could rely on the Congressional findings; in the Communist Control Act;⁵¹ or both. However, it must be made clear that this was purely for the purpose of establishing a *prima facie* case. The petitioners were free to submit any rebuttal evidence. The record clearly reveals that ample opportunity was afforded them to submit such evidence as they wished with respect to the nature and character of the Party but they failed to avail themselves of the proffered opportunity. They must be deemed to have waived this objection.

Insofar as the petitioners predicate a violation of due process on the lack of justification for the respondent's determination, conceding the criminal character of the petitioners, the respondent necessarily relies, in support thereof, on the provisions of the Communist Control Act which terminated their rights, privileges and immunities. The petitioners' criticism, based on the alleged fact that no State interest underlies the State action is without any rational foundation because it is based on a false premise: The respondent, responsible for the operation of New York's Unemployment Insurance Law, is under the obligation to determine coverage thereunder.⁵² Like everyone else, he is subject to the operation and effect of all laws, Federal and State, which have an impact upon the execution of his duties. Among these was, of course, the Communist Control Act, which, without further implementa-

⁵⁰ See pp. 23 *et seq.*, *supra*.

⁵¹ See footnote 19 on p. 20, *supra*.

⁵² See p. 22, *supra*.

tion, statutory or otherwise, Federal or State,⁵³ forced his hand in the manner in which it has moved. As the Court below said (37):

"In so doing, he could not ignore the Federal Communist Control Act * * *. We take that plain declaration and its absolute language to mean what it says, although we find no decisions construing it in this connection. It necessarily means that the artificial body or entity calling itself the Communist Party is to be deprived of all the 'rights, privileges and immunities' that other such entities have."

As to the alleged violation of the equal protection clause, a distinction must be drawn between an individual or an entity found guilty of a crime, but which is engaged in a legitimate business totally unrelated to the criminal acts, and an entity such as the Communist Party whose criminal character and activities so permeate its every fibre that it is not inherently or otherwise capable of engaging in any legal activities. Its criminal character and activities have a direct relationship to its inability to possess legal viability (*Sprott v. United States*, 20 Wall. 459, 464-465 [1874]).⁵⁴

⁵³ See p. 61, *supra*.

⁵⁴ See, also, pp. 39-41, *supra*.

CONCLUSION

The judgment below should be affirmed.

Dated: Albany, N. Y., April 14, 1961.

Respectfully submitted,

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Subversive Activities Control Act of 1950.

(50 U. S. Code § 781, *et seq.*, 64 Stat. 987, *et seq.*)

“§ 781. CONGRESSIONAL FINDING OF NECESSITY

As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress finds that—

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

(2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality.

(3) The system of government known as a totalitarian dictatorship is characterized by the existence of a single political party, organized on a dictatorial basis, and by substantial identity between such party and its policies and the government and governmental policies of the country in which it exists.

(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

(5) The Communist dictatorship of such foreign country, in exercising such direction and control and

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in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

(6) The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves.

(7) In carrying on the activities referred to in paragraph (6) of this section, such Communist organizations in various countries are organized on a secret, conspiratorial basis and operate to a substantial extent through organizations, commonly known as 'Communist fronts', which in most instances are created and maintained, or used, in such manner as to conceal the facts as to their true character and purposes and their membership. One result of this method of operation is that such affiliated organizations are able to obtain financial and other support from persons who would not extend such support if they knew the true purposes of, and the actual nature of the control and influence exerted upon, such 'Communist fronts'.

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(8) Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement.

(9) In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

(10) In pursuance of communism's stated objectives, the most powerful existing Communist dictatorship has, by the methods referred to above, already caused the establishment in numerous foreign countries of Communist totalitarian dictatorships, and threatens to establish similar dictatorships in still other countries.

(11) The agents of communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law.

(12) The Communist network in the United States is inspired and controlled in large part by foreign agents who are sent into the United States ostensibly as attachés of foreign legations, affiliates of international organizations, members of trading commissions, and in similar capacities, but who use their diplomatic or semidiplomatic status as a shield behind which to engage in activities prejudicial to the public security.

(13) There are, under our present immigration laws, numerous aliens who have been found to be deportable, many of whom are in the subversive, criminal, or immoral classes who are free to roam the country at will without supervision or control.

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(14) One device for infiltration by Communists is by procuring naturalization for disloyal aliens who use their citizenship as a badge for admission into the fabric of our society.

(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States."

Communist Control Act of 1954.

(50 U. S. Code §§ 841, *et seq.*; 68 Stat. 775, *et seq.*)

"§ 841. FINDINGS AND DECLARATIONS OF FACT

The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality

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of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchal chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed.

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§ 842. PROSCRIPTION OF COMMUNIST PARTY, ITS SUCCESSORS, AND SUBSIDIARY ORGANIZATIONS

The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are hereby terminated: *Provided, however,* That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended.

§ 843. APPLICATION OF INTERNAL SECURITY ACT OF 1950 TO MEMBERS OF COMMUNIST PARTY AND OTHER SUBVERSIVE ORGANIZATIONS; DEFINITION

(a) Whoever knowingly and willfully becomes or remains a member of (1) the Communist Party, or (2) any other organization having for one of its purposes or objectives the establishment, control, conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political subdivision thereof, by the use of force or violence, with knowledge of the purpose or objective of such organization shall be subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a 'Communist-action' organization.

(b) For the purposes of this section, the term 'Communist Party' means the organization now known as the Communist Party of the United States of America, the Communist Party of any State or subdivision thereof, and any unit or subdivision of any such

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organization, whether or not any change is hereafter made in the name thereof.

§ 844. SAME; DETERMINATION BY JURY OF MEMBERSHIP, PARTICIPATION, OR KNOWLEDGE OF PURPOSE

In determining membership or participation in the Communist Party or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented, as to whether the accused person:

(1) Has been listed to his knowledge as a member in any book or any of the lists, records, correspondence, or any other document of the organization;

(2) Has made financial contribution to the organization in dues, assessments, loans, or in any other form;

(3) Has made himself subject to the discipline of the organization in any form whatsoever;

(4) Has executed orders, plans, or directives of any kind of the organization;

(5) Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the organization;

(6) Has conferred with officers or other members of the organization in behalf of any plan or enterprise of the organization;

(7) Has been accepted to his knowledge as an officer or member of the organization or as one to be called upon for services by other officers or members of the organization;

(8) Has written; spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plans of the organization;

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(9) Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization;

(10) Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization;

(11) Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the organization or to anyone else in behalf of the objectives of the organization;

(12) Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization;

(13) Has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization;

(14) The enumeration of the above subjects of evidence on membership or participation in the Communist Party or any other organization as above defined, shall not limit the inquiry into and consideration of any other subject of evidence on membership and participation as herein stated."

Feinberg Law (L. 1949, ch. 369, § 1)

"The legislature hereby finds and declares that there is common report that members of subversive groups, and particularly of the communist party and certain of its affiliated organizations, have infiltrated into public employment in the public schools of the state. This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of

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any state or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. * * * The legislature further finds and declares that in order to protect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced.
* * *

Report of (United States) House of Representatives Committee on Un-American Activities relative to the Internal Security Act of 1950 (House Report No. 2980, dated August 22, 1950; U. S. Code Congressional and Administrative News 1950, p. 3886)

"Necessity For Legislation

The need for legislation to control Communist Activities in the United States cannot be questioned.

Over 10 years of investigation by the Committee on Un-American Activities and by its predecessor committee has established (1) that the Communist movement in the United States is foreign-controlled; (2) that its ultimate objective with respect to the United States is to overthrow our free American institution in favor of a Communist totalitarian dictatorship to be controlled from abroad; (3) that its activities are carried on by secret and conspiratorial methods; and (4) that its activities, both because of the alarming march of Communist forces abroad and because of the scope and nature of Communist activities here in the United States, constitute an immediate and powerful threat to the security of the United States and to the American way of life.

* The Communist program of conquest through treachery, deceit, infiltration, espionage, sabotage, corruption, and terrorism has been carried out in country after country and is an ever-growing threat to the

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national security of this and other countries. There is ample evidence that one of the primary objectives of the world Communist movement, directed from within the most powerful existing Communist totalitarian dictatorship, is to repeat this pattern in the United States.

There is incontrovertible evidence of the fact that the Communist Party of the United States is dominated by such totalitarian dictatorship and that it is one of the principal instrumentalities used by the world Communist movement, in its ruthless and tireless endeavor to advance the world march of communism.

The findings which support these conclusions, and the vast quantity of evidence on which they are based, are set forth in detail in the numerous reports which this committee and its predecessors have printed and circulated. Corroboration has been supplied by independent and exhaustive research by other committees of Congress.

Concern over this threat is not limited to the legislative branch of our Government. At the present time 30 of the 70 major countries in the world have outlawed the Communist Party. Many other countries have adopted various legislative decrees against communism, and since 1947 the trend has been toward declaring all Communist activities illegal. Panama was the latest to take such action. This action came in April of this year. * * *

Concern over the Communist threat has not been overlooked by the different State legislatures. At the present time 33 States have laws against the displaying of the 'Red' flag; 12 States have criminal anarchy laws; 16 have criminal syndicalism laws; 22 have sedition laws; 16 have laws against the Communist Party candidates appearing on the election ballot; 19 States exclude Communists from public employment; 28 States require loyalty oaths of all employees; and 20 States require teachers to take loyalty oaths."

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Excerpts from the statement issued by the conference of 81 Communist Parties, held in Moscow in November, 1960 (as provided in English by Tass, Soviet press agency, and reprinted in the New York Times, December 7, 1960, pp. 14-17).

"The chief result of these years is * * * the intensification of class struggles in the capitalist world, and the continued decline and decay of the world capitalist system; * * *.

Nevertheless, imperialism which is intent on maintaining its positions, sabotages disarmament, seeks to prolong the cold war and aggravate it to the utmost, and persists in preparing a new world war. This situation demands * * * the further consolidation of all revolutionary forces in the fight against imperialism, for national independence, and for socialism.

Our time * * * is a time of struggle between the two social systems, a time of socialistic revolutions and national liberalistic revolutions, * * * a time of transition of more peoples to the socialistic position, of the triumph of socialism and communism on a world wide scale.

* * *

* * * A reliable basis has been provided for further decisive victories for socialism. The complete triumph of socialism is inevitable.

* * *

The decay of capitalism is particularly marked in the United States of America, the chief imperialist country of today.

* * *

* * * U. S. imperialism has become the biggest international exploiter.

* * *

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International developments in recent years have furnished many new proofs of the fact that United States imperialism is the chief bulwark of world reaction and an international gendarme, that *it has become an enemy of the peoples of the whole world.*

* * *

The Communist parties determine the prospects and tasks of revolution in keeping with the concrete historical and social conditions obtaining in their respective countries and with due regard for the international situation.

* * *

Communists regard the struggle for democracy as a component of the struggle for socialism. In this struggle they continuously strengthen their bonds with the masses, increase their political consciousness and help them understand the tasks of the socialist revolution and realize the necessity of accomplishing it.

This sets the Marxist-Leninist parties completely apart from the reformists, who consider reforms within the framework of the capitalist system as the ultimate goal and deny the necessity of socialist revolution. Marxists-Leninists are firmly convinced that the peoples in the capitalist countries will in the course of their daily struggle ultimately come to understand that socialism alone is a real way out for them.

* * *

The Marxist-Leninist parties head the struggle of the working class, the masses of working people, for the accomplishment of the socialist revolution and the establishment of the dictatorship of the proletariat on one form or another. The forms and course of development of the Socialist revolution will depend on the specific balance of the class forces in the country concerned, on the organization and maturity of

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the working class and its vanguard, and on the extent of the resistance put up by the ruling classes.

. . .

Relying on the majority of the people and resolutely rebuffing the opportunist elements incapable of relinquishing the policy of compromise with the capitalists and landlords, the working class can defeat the reactionary, anti-popular forces, secure a firm majority in parliament, transform parliament from an instrument serving the class interests of the bourgeoisie into an instrument serving the working people, *launch an extra-parliamentary mass struggle*, smash the resistance of the reactionary forces and create the necessary conditions for peaceful realization of the socialist revolution.

. . .

In the event of the exploiting classes' resorting to violence against people, *the possibility of non-peaceful transition to socialism should be borne in mind*. Leninism teaches, and experience confirms, that the ruling classes never relinquish power voluntarily. In this case the degree of bitterness and the forms of the class struggle will depend not so much on the proletariat as on the resistance put up by the reactionary circles to the will of the overwhelming majority of the people, on these circles' using force at one or another stage of the struggle for socialism.

. . .

The interests of the struggle for the working-class cause demand ever closer unity of the ranks of each Communist party and of the great army of Communists of all countries; they demand of them unity of will and action. It is the supreme internationalist duty of every Marxist-Leninist party to work continuously for greater unity in the world communist movement.

. . .

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All the Marxist-Leninist parties are independent and have equal rights, they shape their policies according to the specific conditions in their respective countries and in keeping with Marxist-Leninist principles, and support each other. The success of the working-class cause in any country is unthinkable without the internationalist solidarity of all Marxist-Leninist parties. *Every party is responsible to the working class, to the working people of its country, to the international working class and communist movement as a whole.*

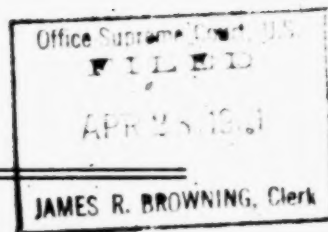
* * *

The Communist and workers parties unanimously declare that the Communist party of the Soviet Union has been, and remains, the universally recognized vanguard of the world communist movement, being the most experienced and steeled contingent of the international communist movement.

* * *

* * * *Mutual assistance and support in relations between all the fraternal Marxist-Leninist parties embody the revolutionary principles of proletarian internationalism applied in practice.* (Emphasis added.)

COPY



IN THE
Supreme Court of the United States

October Term, 1960

No. 495

COMMUNIST PARTY, U. S. A. and COMMUNIST
PARTY OF NEW YORK STATE,
Petitioners,

v.

MARTIN P. CATHERWOOD, as Industrial
Commissioner.

On Writ of Certiorari to the Court of Appeals of New York

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

**I. Respondent's misapplication of Section 3 of the
Communist Control Act.**

A. The construction of section 3 by federal agencies.

Our principal brief stated (Pet. Br. 26) that the Bureau of Internal Revenue has rejected respondent's construction of section 3 of the Communist Control Act and construes the section as having no effect upon the status of petitioners as employers or their liability to taxation as such.

This statement has been confirmed by the Solicitor General's letter of April 10, 1961, to the Clerk declining

the Court's invitation to intervene or file a brief *amicus curiae*. The letter states:

"There is no need to file a brief describing the practice of federal agencies in interpreting the statute, for this information is already set forth in the opinion of Judge Fuld in the New York Court of Appeals."

The passage from Judge Fuld's dissent to which the Solicitor General referred reads (R. 41):

"This contention [that the Communist Control Act terminated petitioners' status as employers and their liability to unemployment insurance taxes] is unreasonable. In the first place, it is significant that the federal authorities, admittedly aware of the Industrial Commissioner's position, have taken one diametrically opposed and continue to recognize the Communist Party as an employer subject to the Federal [Unemployment Tax] act."

It is a fair inference from the Solicitor General's letter that the position attributed by Judge Fuld to "the federal authorities" is that of the Department of Justice as well as of the Bureau of Internal Revenue.

The prevailing opinion below states (R. 38) that "there is not enough in the record to prove any binding Federal administrative construction of the Federal act." We believe with Judge Fuld that there has long been a clear federal administrative construction of section 3¹ and, hence, that this statement in the prevailing opinion was wrong when written. It is unquestionably wrong today in the light of the Solicitor General's letter.

Respondent's brief states that, "in the case at bar interpretation and application of the Communist Control Act devolved upon the state *in the absence of* a clear expression of policy by Federal administrative authorities"

¹ As we have also shown (Pet. Br. 26-28), this administrative construction has been accepted and adopted by Congress.

(Resp. Br. 61-62, ^aemphasis supplied).² The Solicitor General's letter negates any contention that there has been no clear and relevant federal administrative interpretation of section 3 of the Communist Control Act. Accordingly, as respondent acknowledges in the foregoing quotation, the federal interpretation is binding on the state authorities.

B. The inapplicability of section 3 to petitioner's liability to taxation.

Our principal brief (p. 14) pointed out that since section 3 of the Communist Control Act does not and could not have been intended to extinguish petitioners' liabilities, it did not terminate their liability to unemployment insurance taxation.

In reply to this point, respondent cites the cases holding that an activity otherwise taxable is not relieved from taxation because it is unlawful (Resp. Br. 54-56). Respondent seems to think that these cases refute our argument. In fact, they reinforce it. For under these decisions, petitioners would not have been exempted from employment taxes on the wages they pay even if section 3 had expressly prohibited them from having employees.

II. Respondent's "criminal conspiracy" theory.

Respondent devotes twenty pages of argument (Resp. Br. 23-43) to the proposition that the suspension of petitioners as contributing employers under the state unemployment-

² Had respondent desired a clear and authoritative statement of the Federal government's administrative interpretation of section 3 of the Communist Control Act as applied to petitioner's liability for employment taxes, he could readily have obtained one from the Commissioner of Internal Revenue. No request for such an interpretation was made because respondent did not originally base his action suspending petitioners as contributing employers on section 3. Instead, he relied on the theory stated in the Attorney General's opinion that petitioners are criminal conspirators and, hence, that it would be contrary to public policy to permit them or their employees to enjoy coverage under the state Unemployment Insurance Law. See Pet. Br. 34-35. Thus, the notion that respondent's action could be justified under section 3 was an afterthought.

ment insurance law "was justified by reason of the fact that each of the petitioners constitutes a criminal conspiracy" (*id.* 23). Respondent contends that "judicial notice [should] be taken at all stages of the proceeding of the fact that petitioners constituted a criminal conspiracy" (*ibid.*), that petitioners "are constitutionally incapable of an innocent or legal act" (*id.* 39), and therefore that they lack the capacity to be employers or to be taxed as such (*id.* 42).

This portion of respondent's argument appears to assert that there is a justification for his action which is independent of and separate and distinct from any justification supplied by section 3 of the Communist Control Act. Elsewhere in his brief, however, respondent denies that this is the case. In answering our contention (Pet. Br. 33-38) that his action, if viewed as state action, violates the Fourteenth Amendment, respondent states (Resp. Br. 79): "Insofar as the petitioners predicate a violation of due process on the lack of justification for the respondent's determination * * * the respondent necessarily relies, in support thereof, on the provisions of the Communist Control Act which terminated their rights, privileges and immunities." Again, respondent states (*id.* 79-80) that the Communist Control Act, "without further implementation, statutory or otherwise, Federal or State, forced his hand in the manner in which it has moved." Moreover, these statements appear under a point which bears the caption, "The action of the State, pursuant to the mandate of the Communist Control Act, did not result in a violation of the Fourteenth Amendment" (*id.* 78).

Since respondent, in these passages, concedes that the sole justification for his action was "the mandate of the Communist Control Act", the only questions which the case presents are the construction and constitutionality of section 3 of that act.³ Accordingly, respondent's conces-

³ If respondent's action was required by the mandate of the Communist Control Act, his action was not state action and presents no questions under the Fourteenth Amendment. See Pet. Br. 33.

sion makes his entire "criminal conspiracy" argument irrelevant.

Respondent's argument is not only irrelevant but patently fallacious.

There is, of course, no evidence in the record that petitioners are criminal conspirators (Pet. Br. 4-5). Respondent says that evidence was unnecessary because petitioners' guilt is a matter of judicial notice (Resp. Br. 23). As respondent acknowledges however (Resp. Br. 5, n. 10), the Court has held that where the alleged criminal character of the Communist Party is an issue in a proceeding to fasten criminal liability or a civil disability upon an individual, it must be proved by evidence.⁴ *Yates v. United States*, 354 U. S. 298; ⁵ *Nowak v. United States*, 356 U. S. 660; *Adler v. Board of Education*, 342 U. S. 485; *Schwartz v. Board of Bar Examiners*, 353 U. S. 232. Respondent insists (*ibid.*) that these decisions are inapplicable to a proceeding against the Party itself. But the only ground he offers for the distinction is the mumbo-jumbo that petitioners "are a crime, just as burglary and arson, murder and treason are crimes" (Resp. Br. 34).

Of course, petitioners' case is no different from that of an individual. In either, a deprivation of rights without proof of the charges said to support the deprivation is a denial of due process. See Pet. Br. 30, 37-38 where we also refute respondent's contention (Resp. Br. 23, 68-69) that petitioners' failure to disprove the conspiracy charge at the hearing before the referee was a waiver of any objection to the taking of judicial notice that the charge is true.

⁴ Curiously, respondent makes this concession in his summary of argument but not in his argument.

⁵ *Yates* flatly held (at 329-30) that the government had failed in its attempt to prove that the Communist Party was engaged in a criminal conspiracy.

Finally, respondent's action suspending petitioners as contributing employers could not be sustained even if he had tried and succeeded where the prosecution in *Yates* failed and had proved that petitioners are engaged in a criminal conspiracy. For even in that case, petitioners would be subject to unemployment insurance taxation at least with respect to those of their employees whose employment is innocent. Respondent seeks to escape from this obvious result with the *ipse dixit* (Resp. Br. 39) that petitioners "are constitutionally incapable of an innocent or legal act." The extravagant irresponsibility of this assertion (see Pet. Br. 36, n. 42) is matched only by respondent's further contention (Resp. Br. 72) that the Communist Party "is not protected under the Bill of Rights."

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 495.—OCTOBER TERM, 1960.

Communist Party, U. S. A., et al.,
Petitioners,

v.

Martin P. Catherwood,
as Industrial Commissioner.

On Writ of Certiorari
to the Court of Ap-
peals of New York.

[June 12, 1961.]

MR. JUSTICE HARLAN delivered the opinion of the Court.

We here review the upholding by the New York Court of Appeals of the action of the New York State Industrial Commissioner terminating petitioners' registration and liability to state taxation as employers under the New York State Unemployment Insurance Law. N. Y. Labor Law 511-512, 517-518, 570, 577, 581. This determination was effected under what was conceived to be the compulsion of a federal statute, the Communist Control Act of 1954, 50 U. S. C. § 841-844, which provides, in pertinent part:

"Section 2. The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States Therefore the Communist Party should be outlawed.

"Section 3. The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political

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subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof, and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are hereby terminated: Provided, however, That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended." (Emphasis supplied.)

New York has an "experience rating" scheme whereby employers with consistent records of high employment levels are taxed at a lower rate than would otherwise obtain. Under the Federal Unemployment Tax Act, 26 U. S. C. §§ 3301-3308, an employer is entitled to a federal tax credit for the amount paid in state unemployment taxes. If the state taxing structure allows for a reduction in tax rate to employers with good employment records under a federally certified "experience rating" system, the federal tax is nevertheless reduced by the highest rate imposed by the state, so that the employer retains the full benefit of his experience rating reduction. Thus, before the termination of their New York registration the combined federal and state tax rate of the petitioner, Communist Party, U. S. A., was 1%, and that of the petitioner, Communist Party of New York State was, according to its representations, 1.1%. The effect of the registration termination as to both was to increase the rate to the 3%, the rate provided in the federal statute.¹

¹ The basic federal rate was increased to 3.1% by Public Law 86-778, § 523 (c), effective 1961. 26 U. S. C. § 3301.

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We granted certiorari, — U. S. —, to consider the petitioners' claims that New York has mistakenly construed the Communist Control Act of 1954 to require termination of their status as employers under the New York statute, and contrariwise, both that § 3 of the Communist Control Act, so construed, and New York's termination of registration, infringed the Constitution of the United States.²

We must reject at the outset respondent's contention that the Court of Appeals' decision rested on a determination, based on judicial notice which was not displaced by any proof, that petitioners were not employers within the meaning of § 512 of the New York Labor Law, but a criminal conspiracy. It is entirely clear that the Industrial Commissioner and the Unemployment Insurance Referee,³ the Unemployment Insurance Appeal Board,⁴ and the Court of Appeals⁵ all based their determination squarely on what they conceived to be the compulsion of the Communist Control Act. The Court of Appeals' amended remittitur, which states that the questions of the con-

² Petitioners argue that the Act on its face and as applied violates the Due Process Clause of the Fifth Amendment and Art. I, § 9, cl. 3 of the Federal Constitution, which provides that "no Bill of Attainder or ex post facto Law shall be passed." Petitioners also contingently assert a Fourteenth Amendment claim, see note 6, *infra*.

³ The Referee, in reviewing the administrative action of the Commissioner stated that "the Commissioner's representatives . . . urge that Congress has effectively outlawed the Communist Party and thus, by force of law, the Referee is bound to find . . . that there could not have been any valid employment. . . ." (R. 5.) This contention the Referee accepted, holding that "Congress effectively terminated the right of the Parties to enter into contracts of employment" (R. 7.)

⁴ The Board affirmed the Referee's conclusions of law. (R. 2.)

⁵ See 8 N. Y. 2d 77, at 83, for the opinion of Chief Judge Desmond, with whom Judge Dye concurred, and *id.*, at 90-91, for the opinion of Judge Van Voorhis, with whom Judge Burke concurred. Two judges of the court dissented, and one judge did not participate.

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struction and constitutionality of the Communist Control Act "were presented and necessarily passed upon," puts the matter beyond doubt.*

Following the familiar rule that decision of Constitutional questions should be avoided wherever fairly possible, we turn at once to the federal statute which this Court has not heretofore had occasion to construe. Apart from unrevealing random remarks during the course of debate in the two Houses, there is no legislative history which in any way serves to give content to the vague terminology of § 3 of the Communist Control Act. The statute contains no definition, and neither committee reports nor authoritative spokesmen attempt to give any definition, to the clause "right, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the United States or any political subdivision thereof." Respondent would have us construe this language to mean that wherever a situation advantageous to the petitioners occurs by reference to the statutory or common law of a State or any other government in the United States, this is to be considered a "right," "privilege," or "immunity," and must be deemed to be withheld by the Act. On this basis New York has reasoned that liability to taxation as an employer, though not a privilege in the ordinary sense of the term, is nonetheless a recognition of the common-law contractual capacity to employ, and as such is advantageous to petitioners; and further, that an employer whose employees are unable to benefit from state and federal unemployment insurance programs will be disadvantaged in finding and keeping employees. Therefore it was thought that the Communist Control Act required termination of the registration of petitioners as employers.

* Petitioners also argue that if the administrative action rested upon some state procedural ground, as respondent contends, then that action violated the Due Process Clause of the Fourteenth Amendment. We do not reach this contention.

This interpretation, raising as it does novel Constitutional questions, the answers to which are not necessarily controlled by decisions of this Court in connection with other legislation dealing with the Communist Party, must, we think, be rejected. Not only does the language of the statute fall far short of compelling such an interpretation, but there are good indications that the particular result of barring petitioners as employers under state and federal unemployment insurance systems was not within the contemplation of this Act. The Internal Revenue Service has continued to collect taxes from petitioners under the Federal Unemployment Tax Act,⁷ and Congress in 1956 has dealt in terms with a like matter, excluding from federal old-age, survivors and disability benefits, 42 U. S. C., c. 7, subchapter, II, employment with any organization required to register by the Subversive Activities Control Board and removing from the coverage of the Federal Insurance Contributions Act, 26 U. S. C., c. 21, any such organization,⁸ thus tying the exclusion to the administrative fact findings and deter-

⁷ The Solicitor General, in a letter to the Clerk of this Court responding to a certification by the Court to the Attorney General of the United States, that the constitutionality of a federal statute had been drawn into question in this case, stated that "there is no need to file a brief describing the practice of federal agencies in interpreting the statute [The Communist Control Act of 1954], for this information is already set forth in the opinion of Judge Fuld in the New York Court of Appeals." The dissenting opinion of Judge Fuld states that "the federal authorities, admittedly aware of the Industrial Commissioner's position, have taken one diametrically opposed and continue to recognize the Communist Party as an employer subject to the Federal act."

⁸ 42 U. S. C. § 410 (a) (17) and 26 U. S. C. § 3121 (b) (17), Act of August 1, 1956, § 121 (c) and (d), 70 Stat. § 39. No similar exclusion, however, has been made from the coverage of the Federal Unemployment Tax Act, 26 U. S. C., c. 23, which imposes the federal tax against which the state taxes involved in this case are credited. See pp. —, *supra*.

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minations required by the Internal Security Act of 1950. ———; see *Communist Party v. Subversive Activities Control Board*, — U. S. —.

In face of these considerations we should hesitate long before attributing to Congress a purpose to effectuate the similar exclusion in this instance by legislative fiat. Our reluctance to accept a state interpretation which would have that effect is fortified both by the difficult Constitutional questions that would result, and by the undesirability of having conflicting state and federal administrative interpretations of a federal statute establishing this "coordinated and dual system" (*Buckstaff Co. v. McKinley*, 308 U. S. 358, 364) of employment insurance.

We hold that the Communist Control Act of 1954 does not require exclusion of the petitioners from New York's unemployment compensation system. Since the New York Court of Appeals' decision unmistakably rested on the contrary premise, its judgment must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK concurs in the result.